

# THE COMMITTEE OF DETAIL

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## I. INTRODUCTION

### A. THE PROBLEM OF MADISON'S NOTES

The principal source for our knowledge of the drafting of the Constitution is James Madison's *Notes* of the debates in the Philadelphia Convention of 1787.<sup>1</sup> Other delegates—Robert Yates, Rufus King, James McHenry, Alexander Hamilton—from time to time kept a sketchy diary; and there is also the official, but remarkably uninformative, *Journal*, which is little more than a calendar of resolutions and votes. Madison stands apart. He left behind a careful record, rich in anecdotal detail, of each day's proceedings, from the first straggling arrival of the delegates in Philadelphia until the concluding ceremonies four months later.

It is primarily to the *Notes* that we owe our knowledge of the dramatic events, both human and intellectual, of that summer: the silent but powerful presence of Washington in the president's chair; Edmund Randolph's presentation on May 29 of the Virginia Plan; the initial testing of the waters as late-

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1. Madison did not himself give a title to his manuscript notes from the 1787 Convention; they were first published four years after his death in *THE PAPERS OF JAMES MADISON* (H. D. Gilpin ed., 1840). Gilpin gave them the heading, "Debates in the Federal Convention." In conformity with standard usage, I refer to them as Madison's *Notes*.

comers continued to arrive; the first skirmishes in early June between the delegates from the small states and those from the large; Franklin's efforts to cool tempers; then, on June 15, the submission, on behalf of the small states, of the New Jersey plan. This submission was followed by more than a month of increasingly acrimonious debate that brought proceedings to a standstill and threatened to derail the Convention altogether. The arguments of the "great debate" were punctuated by the inebriated discourse of Luther Martin and the day-long speech of Hamilton. Then, finally, on July 16, the controversy was resolved by the adoption of the "Connecticut Compromise." After July 16 the mood seems to have lightened, and the delegates turned their attention to less contentious matters. The Convention adjourned for ten days to let the Committee of Detail arrange the work that had so far been accomplished and resumed business on August 6. But this period of relative calm was to be interrupted once more in the middle of August as the delegates clashed again, this time primarily over the issue of the slave trade. A second, less honorable, compromise was reached. Then came the final negotiations, the polishing of the text by Gouverneur Morris, the signing ceremony on September 17, and the extraordinary concluding speech by Benjamin Franklin.

Without Madison we would know little of these episodes: and the *Notes* form the backbone of the standard scholarly reference, Max Farrand's *Records of the Federal Convention of 1787*.<sup>2</sup> Remarkably, Madison recorded his *Notes* while he was himself serving as one of the most active members of the Convention—regularly proposing motions, making arguments, answering objections. As Jefferson wrote to John Adams in 1815, "Do you know that there exists in manuscript the ablest work of this kind ever yet executed, of the debates of the constitutional convention of Philadelphia in 1788 [*sic*]? The whole of every thing said and done there was taken down by Mr. Madison, with a labor and exactness beyond comprehension."<sup>3</sup>

2. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) [hereinafter CONVENTION RECORDS]. Farrand's original three-volume work was re-issued in 1937; by that time, he had discovered enough further documentation to fill a fourth volume. In 1987, James H. Hutson took the somewhat disorganized materials in Farrand's fourth volume and combined them with newly-discovered materials into his SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (James H. Hutson ed., 1987) [hereinafter SUPPLEMENT]. Farrand's first three volumes were re-issued at that time; so the current edition consists of the first three volumes and the Hutson SUPPLEMENT. The earlier volume four is now superseded.

3. 3 CONVENTION RECORDS, *supra* note 2, at 421 (letter of Jefferson to Adams of August 10, 1815).

Jefferson's admiration is fully justified. Nevertheless, as historians have long recognized, the *Notes* have serious limitations. In the first place, they are incomplete. They do not record the inner workings of the Convention's various subcommittees, even if Madison was a member. They scarcely mention the (no doubt incessant) discussions and bargaining that took place out of doors. Even as a record of what was said on the floor of the State House they are manifestly deficient. The Convention met for at least five hours a day, and frequently longer.<sup>4</sup> But a typical entry in the *Notes* can easily be read aloud in ten minutes. The *Notes*, in other words, are not a transcription of what the delegates said, but something quite different. They are, inevitably, a summary of what Madison understood the delegates to have said, and, beyond that, of what he judged sufficiently important to record. These facts are often overlooked; and writers who parse the speeches in the *Notes* as though they are direct quotations are making an elementary error.

Because of these limitations, historians of the Convention have labored to fill in the background, to get behind Madison's record of events; and a comparison of Farrand's influential monograph (published in 1913, and still in print) with Richard Beeman's comprehensive treatment a century later will show the progress that has been made.<sup>5</sup> About the general background—about the biographies of the delegates, about the social and economic setting, about politics and ideology, about the place of the Convention in American history—we know incomparably more. But the study of the primary texts of the Convention has languished and has remained more or less where Farrand and Jameson left it a century ago.<sup>6</sup>

4. Washington recorded in his diary that the Convention met "not less than five, for a large part of the time six, and sometimes 7 hours sitting every day." 3 CONVENTION RECORDS, *supra* note 2, at 81. Strictly speaking, most of these meetings were meetings of the Committee of the Whole, which was entitled to follow more flexible parliamentary rules than the Convention. In order to avoid confusing the Committee of the Whole with the Committee of Detail, I shall speak of "the Convention" throughout.

5. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913); RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION (2009).

6. The primary texts reporting the work of the Convention itself, especially Madison's *Notes*, were printed in Farrand's first two volumes; those two volumes have not been altered since the edition of 1911. CONVENTION RECORDS, *supra* note 2. The same is true for the background materials Farrand collected in his volume three. The new material discovered since 1911 (much of it found by Farrand) is background information in the form of letters, family anecdotes, and the like, almost all of it postdating the Convention; these materials appear in the 1987 Hutson SUPPLEMENT, *supra* note 2.

But there is a further and more subterranean problem. The *Notes* are far too polished to have been written as the speeches themselves were being delivered on the floor. Madison says that he jotted down notes, now lost, which he worked up later into the version we possess today. His own account emphasizes that the working-up occurred immediately: “losing not a moment unnecessarily between the adjournment and reassembling of the Convention I was enabled to write out my daily notes during the session or within a few finishing days after its close.”<sup>7</sup> But Farrand pointed out that Madison sometime after 1819 altered his *Notes* to bring them into conformity with the published *Journal*, and there has long been a question about the extent and the timing of the revisions.<sup>8</sup>

This issue was raised in the early 1950s by William Crosskey of the University of Chicago. Crosskey charged—explicitly in his classes, somewhat more circumspectly in print—that Madison had engaged, years later, in a wholesale re-writing of his *Notes*, and that the intent was to burnish his political reputation. In other words, James Madison was “a forger.”<sup>9</sup> Crosskey did not present persuasive evidence for his claims, which were widely dismissed; and in 1986 James Hutson concluded from a close examination of the original Madison manuscripts that the charges were baseless.<sup>10</sup>

There, for a time, matters rested. But recently Mary Bilder, using new techniques of documentary analysis, has re-opened the question. Her forthcoming book examines the question of the Madison manuscript in detail, although she stops well short of Crosskey’s more extreme claims.<sup>11</sup> The issues here go well beyond Madison. They raise the fundamental question, rarely discussed in the legal literature, of the reliability of the documentary evidence: of its accuracy, of its completeness, and of its

7. 1 CONVENTION RECORDS, *supra* note 2, at xvi.

8. Farrand discusses the alterations to the Madison manuscript in 1 CONVENTION RECORDS, *supra* note 2, at xv–xix. The changes that Farrand discusses were principally to bring his tallies of votes into line with the published *Journal*. But Madison also made about fifty insertions from the published notes of Yates—this even though he knew them to be unreliable.

9. The Crosskey charges are discussed in SUPPLEMENT, *supra* note 2, at xx–xxv. See generally WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

10. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 9–12 (1986).

11. MARY SARAH BILDER, MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION (forthcoming). The possibility of a subsequent re-writing has also been raised on independent grounds by BEEMAN, *supra* note 5, at 85, 98.

integrity. Put bluntly: How much confidence are we entitled to place in *any* purported reconstruction of the events of 1787? How much do we know—how much indeed *can* we know—about the making of the Constitution?

#### B. THE PROBLEM OF THE COMMITTEE OF DETAIL

I wish here to focus on one neglected aspect of this problem. Madison's *Notes* contain a lengthy gap, encompassing ten days at the end of July and the beginning of August. During this time the Convention stood adjourned while the Committee of Detail re-worked the miscellaneous Convention resolutions into a single document. The gap itself is well known; but its significance, in my view, has been underestimated. The Committee is typically treated in a page or two, as an interlude between the more dramatic events on either side. My first claim is that this widespread view is a mistake. This ten-day gap in Madison's *Notes* was arguably the most creative period of constitutional drafting of the entire summer. Certainly, day for day, it was the most intensive. Far from being a mere interlude, at least in certain respects, and for certain fundamental issues, it was the main event.

But the deeper interest of this example lies elsewhere. It raises acute questions of evidence: first, and most obviously, about the physical documents, about their completeness and reliability. But it raises as well another and subtler set of questions—not now about the reliability of the documents, but about the way those documents have been handled and understood by subsequent scholarship. Briefly: How could the full significance of the Committee of Detail have been overlooked? A detailed historiography of the Committee lies beyond the scope of this article, and I shall postpone it to another occasion. But a great deal turns on the history of the documents themselves—on the gaps in Madison's *Notes*, and on the fact that the Committee documents came to light in a haphazard fashion. It is important to remember, as one examines Farrand's polished volumes, that the materials he so carefully assembled were not always available. They came to light at different times; their availability to scholars, or their absence, had an effect on historical interpretation; and a particular interpretation, once established, can take on a life of its own. Farrand was confronted with an untidy mass of papers, widely scattered. He was forced, as any scholar in such a situation would be forced, to make editorial choices—choices about what

to include, where to place it, what to emphasize. Of necessity, his choices were guided by his own understanding of the events of the Convention; and those choices in turn have guided the direction of subsequent research. Even the polish of the volumes can be deceptive: words on the printed page make a different impression than a hasty scrawl on a scrap of paper in the archives. The Committee of Detail offers a striking illustration of these points, and of the way in which the seemingly mundane details of archival research and textual editing can influence our understanding of the drafting of the Constitution.

But let us now turn our attention to the Committee itself.

### 1. Formation of the Committee of Detail

The Committee came about as follows. The delegates to the Convention, after the climacteric vote of July 16, were exhausted. They had been in session, six days a week, for nearly two months, and had spent more than half that time in acrimonious deadlock. Only the bare outline of a Constitution had so far been settled, and the delegates were in ill temper. It was evident that a great deal of work still lay ahead. In addition, the weather in late July had grown “very warme,”<sup>12</sup> and many delegates had business or family to attend to. It was time for a break. Elbridge Gerry on Tuesday, July 24, moved the appointment of a committee to draw up a Constitution “conformable to the Resolutions passed by the Convention.”<sup>13</sup> Ominously, immediately before the vote, General Pinckney of South Carolina “reminded the Convention that if the Committee should fail to insert some security to the Southern States agst. an emancipation of slaves, and taxes on exports, he shd. be bound by duty to his State to vote agst. their Report.”<sup>14</sup> The Convention then voted unanimously to appoint a five-member Committee, which they informally referred to as the “Committee of Detail” or “the Committee of Five.”

The Committee members were selected at the close of business the following day. They were evidently chosen with an eye to geographical balance: Nathaniel Gorham (Massachusetts); Oliver Ellsworth (Connecticut); James Wilson (Pennsylvania); Edmund Randolph (Virginia); John Rutledge (South Carolina).

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12. SUPPLEMENT, *supra* note 2, at 332.

13. 2 CONVENTION RECORDS, *supra* note 2, at 85–87, 95–97; the language quoted is at 106.

14. *Id.* at 95.

Madison (for reasons I shall discuss later) was not selected. Four of the five were eminent lawyers. Randolph was later to serve as Washington's Attorney General. Wilson, Ellsworth, and Rutledge all were appointed by Washington to sit on the Supreme Court; Rutledge and Ellsworth both briefly served as Chief Justice. (Gorham, the odd man out, was a businessman.) Also on Tuesday it was decided to refer to the Committee, in addition to the Convention resolutions, the New Jersey plan and the plan submitted to the Convention by Charles Pinckney on May 29, which apparently had not been heard of since he introduced it.

There is no suggestion, in any of the surviving scraps of evidence, that the Committee was to have *carte blanche*. The expectation appears to have been (as Washington noted in his diary) that the Committee would "arrange, and draw into method & form the several matters which had been agreed to by the Convention, as a Constitution for the United States."<sup>15</sup> The Convention continued to meet through Thursday, July 26, at which point it voted to adjourn for ten days. That would give the Committee time to prepare its Report. The other delegates would have a break. The adjournment and the appointment of the Committee were reported in the local papers.<sup>16</sup> The Committee met; it prepared a draft of a Constitution, which was secretly printed for distribution to the delegates; this printed Report served as the basis for the Convention's deliberations in August and September. Madison's *Notes* cease on July 26; he resumes the narrative with the submission of the Committee's Report to the full Convention on Monday, August 6. About the internal workings of the Committee he says nothing.

## 2. History of the Documents

The Constitutional Convention closed its doors on September 17. As its last official act before the signing, it ordered that the official *Journal* (kept by the Secretary, William Jackson) be turned over to George Washington; the rule of secrecy would remain in vigor.<sup>17</sup> Later that day, Jackson wrote to

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15. 3 CONVENTION RECORDS, *supra* note 2, at 65 (diary entry for July 27). For further scraps, see *infra*, note 50 and accompanying text.

16. THE PHILADELPHIA PACKET AND DAILY ADVERTISER, July 30, 1787, at 3. The importance of this rare lapse from the rule of secrecy should not be exaggerated. There was little choice: otherwise, how to explain to an anxious public the sudden appearance during the day of so many delegates on the streets of Philadelphia?

17. 2 CONVENTION RECORDS, *supra* note 2, at 648.

Washington that “Major Jackson, after burning all the loose scraps of paper which belong to the Convention, will this evening wait upon the General with the Journals and other papers which their vote directs to be delivered to His Excellency.”<sup>18</sup>

In the years that followed, the rule of secrecy surrounding the Convention was strictly observed. There is the odd scrap here and there—a remark in private correspondence, or a family anecdote—but in essence the public knew nothing whatsoever about the internal debates of 1787. Nor was it much enlightened when, in 1819, Congress authorized the publication of the *Journal*, which turned out to be little more than a list of motions and of votes recorded by state. It gives almost no information about the debates or about the contributions of the individual delegates.

The great change came in 1840, when Madison’s *Notes* were published. Now, fifty-three years after the Convention, after the last of the delegates had died, the public finally (it seemed) had a reliable record of events inside the Convention—a contemporaneous record, made with remarkable industry by the revered late President.

Over the next four decades the documentary situation did not greatly change. The story of the Convention told in the *Notes* (and then powerfully reinforced by George Bancroft’s magisterial *History of the Formation of the Constitution*<sup>19</sup>) dominated the historical understanding. Meanwhile, letters and diaries, such as they were, passed from children to grandchildren; some ended in the historical archives that were just then being established. One such set of papers was given in 1876 to the Historical Society of Pennsylvania (“HSP”) by Emily Hollingsworth of Philadelphia, the granddaughter of James Wilson. How they came to their present location is a story worth telling, if only as a reminder of the precariousness of the evidence.<sup>20</sup>

18. 3 CONVENTION RECORDS, *supra* note 2, at 82.

19. GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1882).

20. The discussion that follows is based on an inspection of the documents at the HSP; the correspondence between the director of the HSP and Hollingsworth is located in volume two of the Wilson archive. The original documents for the Committee of Detail are photographically reproduced, with a facing-page transcription, in William Ewald & Lorianne Updike Toler, *Early Drafts of the U.S. Constitution*, 135 PA. MAG. OF HIST. AND BIOG. 227 (2011) [hereinafter COMMITTEE DOCUMENTS]. Updike Toler’s *Addendum* to that article discusses the history of the Wilson documents (including



Wilson died a bankrupt in 1798. His library and many of his possessions were sold to pay his creditors. His private papers passed to his son, Bird Wilson (himself a lawyer and later a distinguished clergyman). Bird used a selection of the papers to prepare an edition of his father's *Works*, which appeared in 1804. There is no evidence that Bird was aware that he had in his possession early drafts of the Constitution. This is not altogether surprising. Because of the strict rule of secrecy, Wilson would never have discussed the proceedings of the Convention with his son. The papers themselves contain no indication that they belong to the work of the Committee of Detail and are not overtly dated to 1787. To all appearances, they are simply untitled documents, mixed in among the other Wilson papers. There would have been no way for Bird to know what they represented.

On Bird's death, the papers went to his niece (and Wilson's granddaughter) Emily Hollingsworth. In June, 1876, she donated to the HSP some papers pertaining both to her uncle and to her grandfather. A few months later the director wrote back to say the donation was a bit "thin," and asked whether she had additional papers. Hollingsworth thereupon made a further donation from her grandfather's estate. Did she understand that, in one or the other of these donations, she was turning over the original manuscript drafts of the Constitution? Apparently not. She mentions as especially noteworthy an entirely commonplace letter from George Washington, and her covering letter concludes, "Do not feel obliged to retain any of the Papers you deem inadmissible to the repositories of your Society . . . ." The archivists at the HSP appear to have had no better understanding of what they had been given. Her donation was handed to a bookbinder, and sewn into two volumes; the damage to some of the more fragile sheets is evident. The Wilson papers at the HSP then appear to have been entirely overlooked by historians for more than two decades.

So, more than a century after the Philadelphia Convention, essentially all that was known about the Committee of Detail was contained in Madison's brief treatment in the *Notes*. He records that the Committee was appointed, lists its members, and reproduces the final printed Report; but about the intervening ten days historians possessed no information.

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additional donations that came after Hollingsworth's death), both before and after their arrival at the HSP.

### 3. Re-discovery of the Committee Documents

In 1899, William M. Meigs published his study of the Convention. It is not itself a significant work; but it proudly announced the discovery of a document in the hand of Edmund Randolph, found among the papers of George Mason, which Meigs correctly identified as an early draft of the Constitution made at the time of the Committee of Detail.<sup>21</sup> How the draft came to be in the Mason papers is unknown. Meigs noted that “[o]ne other draft [of the Constitution] is known to exist” among the Wilson papers at the HSP: note his use of the singular. This seems to be the first mention in print of any of the Wilson drafts.<sup>22</sup>

Meigs did not pursue his own hint, and it appears he did not trouble to look closely at the Wilson archive.<sup>23</sup> Soon thereafter a much more considerable scholar, J. Franklin Jameson, identified among the HSP papers not only Wilson’s successive drafts (in the plural) of the Constitution, but also a copy in his handwriting of the Convention resolutions, and, most surprisingly, a set of extracts, also in Wilson’s handwriting, that Jameson, in a fine piece of close textual analysis, was able to identify as extracts from the New Jersey plan and from the original Pinckney plan. Shortly after Jameson, Andrew C. McLaughlin identified in the Wilson papers a *second* and longer set of extracts from the Pinckney plan.<sup>24</sup>

These new documents from Randolph and Wilson are our most important source of information about the inner workings of the Committee of Detail and are the most significant archival discovery since the publication of Madison’s *Notes*. Max Farrand

21. WILLIAM M. MEIGS, *THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787*, at 317–24 (2d ed. 1900) (announcing discovery of the draft). At the time Meigs wrote, the draft was in the possession of Mason’s great-granddaughter, *see id.* at 4; today it is in the Library of Congress.

22. *Id.* at 324.

23. Meigs’s book re-arranges the events of the Convention by individual clauses of the Constitution, thereby enabling the reader to follow the emergence of any particular clause. *Id.* at 7–10. In effect, it is a book-length index. He describes the Wilson draft as being almost identical to the final Committee report; and for that reason he appears to have regarded it as containing little new information for his project. *Id.* at 324. Somehow he overlooked the other documents in the Hollingsworth collection. I note that Meigs makes it clear in his preface that he was a resident of Philadelphia: he could easily have looked. *Id.* at 6.

24. Jameson’s various textual studies are collected in J.F. Jameson, *Studies in the History of the Federal Convention of 1787*, in 1 ANNUAL REPORT FOR THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1902, at 87 (1903). McLaughlin’s contribution on the Pinckney Plan appeared as an unsigned note. *See Note, Sketch of Pinckney’s Plan for a Constitution, 1787*, 9 AM. HIST. REV. 735 (1904).

carefully collated the new documents and presented them in his magisterial 1911 *Records* (which, incidentally, he dedicated to Jameson). One might have thought that such a discovery, in the hands of scholars of the caliber of Jameson and Farrand, would have led to a re-appraisal of the work of the Committee. But that did not happen. Their interests lay elsewhere. Jameson in particular turned his energies to clearing up the mystery surrounding the Pinckney plan, whose original had been lost, presumably in Major Jackson's bonfire.<sup>25</sup> He was able, using the Wilson extracts, to reconstruct the proposals that Pinckney had submitted in 1787.<sup>26</sup>

#### 4. Historiography of the Committee

But beyond this painstaking analysis of the documents, Jameson and Farrand did not attempt to go. They made no effort to reconstruct the exact sequence of events within the Committee.<sup>27</sup> Farrand's influential 1913 monograph essentially recapitulates the story told by Bancroft, though with a greater mastery of the documents. The focus of his account is on the events on the floor of the Convention and especially on the "great debate." He treats the Committee of Detail in a short chapter of eleven paragraphs.<sup>28</sup>

The leading historians of the Convention have been equally brief. Charles Warren in 1928 gives the Committee of Detail four pages.<sup>29</sup> Andrew McLaughlin in 1935 disposes of it in a single footnote.<sup>30</sup> Irving Brant, writing in 1950, gives it one page.<sup>31</sup>

25. The background is complex. Essentially, Pinckney had submitted a plan which he subsequently, and implausibly, claimed to have been the plan followed by the Convention; but the text of his original plan was lost. This led to considerable controversy, summarized in BEEMAN, *supra* note 5, at 92–99.

26. The fullest reconstruction is given by Farrand. 3 CONVENTION RECORDS, *supra* note 2, at 595–609. The results were something of a surprise. On the one hand, Jameson was able to show (as Bancroft and others had suspected) that the 1818 document was not what Pinckney had presented it as being. On the other hand, it turned out that many elements of Pinckney's plan had in fact found their way into the report of the Committee, and thence into the final Constitution. So the plan was not (as many had assumed) simply "smothered" by sending it to Committee. Jameson, *supra* note 24, at 131.

27. Jameson explicitly set such matters to one side, and noted that his "present concern [was] only with its bearing on the problem of the Pinckney plan . . ." *Id.* at 127.

28. Farrand, *supra* note 5, at 124–33.

29. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 384–87 (1928). Warren's treatment is less careful than Farrand's; he gives Randolph "the lion's share" of the credit for the final Report, which is not a plausible interpretation of the documents.

30. ANDREW C. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 180 (1935).

31. IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800, at 111–12 (1950). Although the pagination splits the discussion onto two pages, the length

Clinton Rossiter in 1966 gives it two pages.<sup>32</sup> The Colliers, twenty years later, also give it two pages.<sup>33</sup> The most recent treatment of the Committee—also the fullest and most balanced—is that by Richard Beeman in 2009. He devotes to it a chapter of eighteen pages. The first dozen give circumstantial background and discuss the biographies of its members; the final pages summarize the substance of its final report.<sup>34</sup> As for legal scholarship, the most recent edition of *Hart & Wechsler*, following the example of the historians, gives it three sentences.<sup>35</sup>

The only extended discussion of the Committee's work I have been able to locate is an article by John C. Hueston, published in 1990. Hueston notes with surprise the paucity of scholarship; correctly identifies the specifically legal importance of the Committee's contributions (especially in the area of state-federal relations); and concludes that the Committee, on this fundamental matter, "altered the course of the Convention."<sup>36</sup> Hueston's article appeared as a student Note in the *Yale Law Journal* and appears to have been entirely overlooked by later scholars.

We are thus left with a curious situation. Farrand's *Records* reproduce fully sixty pages of complex Committee documents.<sup>37</sup> But (Hueston apart) none of the historical accounts attempts to grapple with the technical intricacies. None attempts to develop Jameson's observation, made already in 1903, that "Not a little instruction might be derived from this record of the transmutations which our fundamental document, or its germ, underwent

is one page.

32. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 200–01 (1966). Rossiter attempts to sketch the stages through which the Committee proceeded in a single paragraph: as will become clear from the discussion below, I believe he reconstructs the events inaccurately.

33. CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787, at 168–69 (1986).

34. BEEMAN, *supra* note 5, at 258–76.

35. HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 5–6 (6th ed., Richard Fallon et al. eds., 2009). It is there asserted that the Committee's work was based in part on "a report drafted in 1781 by a committee of the Continental Congress that had sought to revise the Articles of Confederation." This assertion is taken from WARREN, *supra* note 29; although Warren points to some analogies, his assertion of influence is unsupported by the documentary evidence.

36. John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of Federal and State Powers*, 100 YALE L.J. 765, 782 (1990). For my reservations about Hueston's analysis, see *infra* note 133. I broached these issues at length in an article published in 2008; for my reservations about my own analysis, see *infra* note 42.

37. 2 CONVENTION RECORDS, *supra* note 2, at 129–89.

during these eleven [*sic*] days at the hands of the committee.”<sup>38</sup> The Committee is typically treated as an interlude. Plainly, the center of historical curiosity lies elsewhere. Perhaps in the background there is a sense that the Committee was merely tidying up loose ends: only concerned, as it were, with “details.”

#### 5. What the Committee Did

It is not difficult to show that more needs to be said. For terminological convenience it will be helpful to divide the Convention into three “Acts.” Act I covers everything that occurred through July 26. Act II is the Committee of Detail; and Act III is everything that happened afterwards, from August 6 through the signing on September 17.

I mentioned that most discussions of the Committee’s work in the leading monographs take no more than a page or two. The discussions of Act I and Act III typically run to several hundred pages. That this is inadequate can perhaps most readily be seen as follows. The Virginia resolutions introduced by Edmund Randolph at the end of May fill three pages in Farrand’s printed edition. Two months later, at the end of July, the Convention resolutions delivered to the Committee of Detail fill six pages. In other words, by the end of Act I, after prolonged debate, the Convention had managed, roughly speaking, to add three pages to Madison’s plan. The Committee of Detail then went to work. It labored for a little over a week. Its draft of the Constitution fills twelve pages—adding six pages, and doubling the length. The Convention then resumed business and worked for a further six weeks. The result was the final version of the Constitution, which fills fifteen of Farrand’s pages. Page for page, and day for day, the Committee of Detail was the most intense period of drafting of the entire summer.

These facts are of course not by themselves dispositive. It might turn out that the Committee contributions were insignificant, or that they were later rejected by the Convention: and in some cases that is what happened. Still, as every lawyer knows, the power to draft even a common contract, let alone a constitution, is the power to shape the contours and the language and the emphases of the document; and, in the case of the Committee of Detail, it was also the power to structure the ensuing debates of Act III.

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38. Jameson, *supra* note 24, at 127.

So one needs to inspect the substance. The most fundamental contributions of the Committee may be roughly divided into two categories. The first category is a set of provisions relating to slavery and navigation acts—the issues that General Pinckney had raised just before the Committee was established. These provisions were to embroil the Convention in deep acrimony during Act III. That acrimony and its source in the Committee Report is well known and looms large in the standard histories of the Convention.<sup>39</sup>

The second category is the one on which I wish to focus. It is a set of more technically *legal* provisions. The Committee introduced to the Constitution a number of fundamental structural features. The most important are as follows. It introduced an explicit enumeration of congressional powers. It introduced a list of powers prohibited to the states. It introduced the Necessary and Proper Clause, and the Supremacy Clause. It gave the first detailed specification of the jurisdiction of the federal courts. It added the clause on privileges and immunities, the Full Faith and Credit Clause, and the guarantee of republican government. It refined many of the powers of the chief executive, especially in relation to Congress. These matters, although some of them had antecedents in the Articles or the state constitutions, had scarcely been discussed by the Convention in Act I. They were the accomplishment of the Committee of Detail; and, with remarkably little discussion, their substance went more-or-less unchanged into the final text of the Constitution. And they are hardly “details.” They represent, in fact, the very core of American federalism: the distinctive contribution of the Philadelphia Convention to western constitutional governance.

It may be helpful here to distinguish between the history of the *Convention* and the history of *constitutional law*. Act I, with its bitter arguments over proportional representation, belongs primarily to the history of the Convention. The Connecticut Compromise is unquestionably important. Without it, the Convention would have collapsed. But from the point of view of constitutional law it is of little significance. It has given rise to no extensive body of litigation. If it could be altered—if voting strength in the Senate were more nearly proportional to population—perhaps the new system would be somewhat more

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39. The leading discussion is by BEEMAN, *supra* note 5, who gives extensive references to the monograph literature.

democratic.<sup>40</sup> But the United States and its constitutional system would be recognizably the same. That is not true for the structural contributions of the Committee of Detail. Without the enumeration of powers, without the Necessary and Proper Clause, the shape of the federal government would be radically different. Without the architecture of the federal courts, judicial review would be radically different. Without the Supremacy Clause, it would probably not exist. And so on down the list. The high drama of Act I has attracted most of the scholarly attention: but from the point of view of constitutional law, Act II is unquestionably more important.

#### 6. Central Questions

These observations raise a host of questions. First we have a set of questions concerning the work of the Committee of Detail itself. How were these structural provisions inserted into the draft of the Constitution? Is there a relationship between the structural provisions and the slavery provisions? Which members of the Committee were principally responsible for the drafting? What were they intending to achieve? Were they acting *ultra vires*? Did they have a hidden agenda? Were they divided among themselves or did they act as a unit? Did they have a chairman? How, in concrete terms, did they go about the task of drafting? Did they write the drafts sitting together as a group or did they delegate the task to one of their number? What are we to make of the fact that most of the documents are in Wilson's hand? Does this show him to have been the principal author? Why was Madison not a member? Did the Committee do its work in secret or did it consult with other delegates? On what resources did it draw? What documents did it have at its disposal and what are the legal and intellectual sources for its contributions?

Behind these primary questions about the Committee lurks a second group of questions about evidence. What documents do we possess? How were they made and for what purpose? What was their subsequent history and how did they come to be where they are today? Are they complete? How have they been handled by editors and textual scholars? I take it to be obvious that our confidence in the answers to the primary questions must depend in large part on how we answer the secondary questions.

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40. This is the position of ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001).

This much is straightforward. But there is also a considerably more puzzling tertiary question. The documents I have mentioned are all available in Farrand's *Records*. If it is true that the work of the Committee of Detail was of such fundamental importance, why was that fact not noticed long ago? Why have the primary questions not been asked with greater insistence?

#### 7. Historiography Revisited

A full answer to that tertiary question would take us far beyond the bounds of this Article, and I postpone it to another occasion. But for now let us consider more closely the interpretations of the Committee of Detail offered by the leading scholars. Farrand's early analysis of 1913 is sober and careful.<sup>41</sup> He makes some plausible conjectures (which he is careful to label as conjectures) about how the Committee did its work. His account does not stray far from the documents: and he had the advantage of having worked closely with the originals. He points out correctly that the Committee made extensive use of the Articles of Confederation; and he carefully describes the organization of the final Committee draft. He briefly mentions the slave-trade provisions and the enumeration of powers; surprisingly, he does not notice the Necessary and Proper Clause, or the Supremacy Clause. He does not attempt to analyze the likely contributions of the individual members or to work out in detail the sequence of events. His account is accurate as far as it goes; but it leaves most of the primary questions unaddressed.

Farrand was evidently aware of the need for a closer study of the Committee texts. He could not possibly have thought his brief sketch would be the last word on the subject. But, ironically, the very transcriptions of the Committee documents that he for the first time made available in the *Records* may themselves have inhibited later scholarship. Not that Farrand was careless. The documents are arranged in the correct chronological sequence; his transcriptions are painstaking and, for the most part, accurate. The problem lies elsewhere. The original drafts contain frequent deletions and insertions and marginal comments—sometimes in the hand of Wilson, sometimes of Rutledge, sometimes of Randolph. Farrand (perhaps constrained by his publisher) rendered these altera-

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41. FARRAND, *supra* note 5, at 124–33.



tions by a typographical system of italics and brackets that makes it almost impossible to understand what is happening. Comments that in the original are interlineated and assigned to a specific point in the text are rendered indistinguishable from marginal comments assigned to no point in particular: one loses sense of what goes with what, and of the exact sequence of the changes. The task of working out the textual issues is laborious, even if one has access to the original manuscripts. If one relies on the published transcriptions, it becomes far more difficult: almost impossible.<sup>42</sup> At any rate, and for whatever reason, later scholars did not subject the documents themselves to further close scrutiny.

As we move beyond these textual matters and consider the substance of what historians have said about the Committee and its internal workings, we find—to put it mildly—no unanimity. There are five principal theories. (1) *The Committee Theory*. One group of historians (Farrand is an example) treats the members of the Committee as a more-or-less undifferentiated whole and does not try to calculate the contributions of individual members. (2) *The James Wilson Theory*. Another group (apparently influenced by the observation that most of the Committee Documents are in his handwriting) takes James Wilson to be the Committee mastermind. Brant, for example, treating Wilson as a surrogate for Madison, says, “On the straight drafting job, this might be called a committee of Wilson and four others. With Wilson on, it mattered little that Madison was off.”<sup>43</sup> (3) *The Rutledge-and-the-Slave-Power Theory*. For over eighty years, the early historians of the Convention—Bancroft, Farrand, Brant, Rossiter—paid little attention to the issue of slavery. But after the 1960s the focus of historical research began to change. The spotlight shifted to the slavery

42. *Credite vulnerato*. In an article about James Wilson published in 2008 I called attention to the importance of the Committee of Detail and, dividing the Convention into three “Acts,” argued that Act II was fully as consequential as Act I or Act III. I then attempted to piece together its internal workings. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 983–93 (2008). At the time I relied on Farrand’s transcriptions; and although the general analysis still seems to me correct, a close examination of the originals quickly made it clear that I had badly understated the contributions of Randolph and somewhat overstated those of Wilson. That 2008 article supplies background for the present study, especially for Wilson’s role in Act I and for his relations with Madison; but the portion dealing with the Committee of Detail is superseded. New transcriptions and a photographic reproduction of the manuscripts are provided in COMMITTEE DOCUMENTS, *supra* note 20.

43. BRANT, *supra* note 31, at 111. Others who take a similar view are Clinton Rossiter, Charles Page Smith, and Nicholas Pedersen. Nicholas Pedersen, *The Lost Founder: James Wilson in American Memory*, 22 YALE J.L. & HUMAN. 257 (2010).

provisions, and John Rutledge rather than Wilson now becomes the Committee mastermind. Rossiter as late as 1966 could write (incidentally, without adducing any evidence) that Rutledge, as Committee chairman, “kept his colleagues hard at work [and] reduced controversy to a minimum.” But a few years later Rutledge, far from “reducing controversy,” stood accused of aggressively defending the interests of the Slave Power. “The report of the Committee of Detail,” wrote Donald Robinson in 1971, “was a monument to Southern craft and gall.”<sup>44</sup> This view has been influential; and David Stuart in 2007 discusses the Committee under the chapter title, “Rutledge Hijacks the Constitution.”<sup>45</sup> (4) *The Rutledge-Wilson Theory*. Others, while rejecting the “hijacking” thesis, emphasize the alleged close friendship between Wilson and Rutledge, who are seen as the two dominant spirits of the Committee.<sup>46</sup> (5) *The States’ Rights Theory*. Hueston advances a different sort of “hijack thesis.” On his account the larger Convention had favored a “stronger national model” in which the legislature would exercise a general grant of legislative authority; but the five members of the Committee, all adherents of “states’ rights,” worked to place limitations on the national model, and in particular to add the constraint of an enumeration of powers.<sup>47</sup>

This is a remarkable range of interpretations. It is perhaps evident that not all the theories can be correct: what is more surprising is that none of them is. And it is not terribly hard to see what has happened. The historians are interested in something else—the Connecticut Compromise, or slavery, or the social background of the Convention—at any rate, not in *technical* law, and not in what Rossiter, in a chapter title, called “Details, details, details.” So when they come to the Committee they treat it briskly and substitute an interpretation that fits their own preoccupations.

44. DONALD ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765–1820*, at 218 (1971). Or again: “The Convention could not have produced at this critical point an intersectional committee in whose hands the interests of slave owners would have been safer.” *Id.* at 217.

45. DAVID STEWART, *THE SUMMER OF 1787*, at 163–75 (2007).

46. This is essentially the position of Richard Beeman; BEEMAN, *supra* note 5, at 269. Beeman, in my view correctly, rejects the overstatements of Stewart and the “hijack” school (*id.* at 478). This is also the position of SMITH, *infra* note 158, and perhaps ROSSITER, *supra* note 32 at 201, as well, unfortunately, as Ewald, *supra* note 42. For the factual problems, see *infra*, notes 157–158.

47. Hueston, *supra* note 36.

At bottom, what is missing is three things: first, a clear realization of the specifically legal importance of the contributions of Act II; secondly, an understanding of the complexities involved in trying to piece together the internal workings of the Committee; thirdly, recourse to the original documents.

My concern here is with what I earlier called the primary and secondary questions: with attempting to reconstruct, so far as is possible, the workings and the contributions of the Committee of Detail, and with assessing the quality of the documentary evidence. This is a long Article; even so, it should be stressed that it is by no means complete. One important subplot—the presence of the Pinckney extracts in the Wilson archive—requires such a lengthy analysis that I have omitted it entirely. Many lesser matters also have had to be left to one side: the aim here is to concentrate on the fundamentals. The Historical Society of Pennsylvania provided access to the original documents in the Wilson collection; and the Library of Congress made available scanned images of the Randolph draft.<sup>48</sup>

About the tertiary question I shall have little to say. No doubt the neglect of the Committee of Detail has something to do with the great literary merits of Madison's *Notes*: with the drama of the debates, with the colorful anecdotes, with the unforgettable cast of characters. The *Notes* are Technicolor: the records of the Committee of Detail are black-and-white, and in many respects a silent picture. But although these facts undoubtedly play a role, they do not seem to me to provide, even remotely, an adequate explanation. The issues here (I believe) lie extremely deep; but they lie beyond the scope of this Article, and I shall defer them to another time.

## II. THE COMMITTEE DOCUMENTS

### A. OVERVIEW OF THE DOCUMENTS

Because we do not have Madison's *Notes* to guide us, the interpretation of the work of the Committee depends on a close

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48. These are transcribed with photographic reproductions in CONVENTION DOCUMENTS, *supra* note 20. For the convenience of readers I also give references to the corresponding pages in Farrand's CONVENTION RECORDS, *supra* note 2; if there are discrepancies, that is because Farrand's transcriptions are being corrected *sub silentio*.

inspection of papers that were not written for the convenience of historians. Let me start by saying something about these Committee documents in general and then examine them one-by-one.

The first document (the one identified by Meigs) is in the handwriting of Edmund Randolph, with comments in the distinctive, spiky hand of John Rutledge. The document consists of five sheets of paper, written (except for the last sheet) on both sides. This document is currently housed at the Library of Congress.

All the other Committee documents are in the Wilson archive at the HSP, and all are in Wilson's handwriting. They contain, first, a list, on a single folio sheet, folded to make four pages, of the twenty-four resolutions that the Convention referred to the Committee. The Convention was sensitive about not permitting copies to be made of its resolutions. Early in the proceedings it resolved that no copies be taken "without leave of the House" (and in fact on July 25 refused permission to Luther Martin to make a copy).<sup>49</sup> Wilson's text of the resolutions and the version in Madison's *Notes* are the only two copies known to have survived. (I note in passing that the Wilson archive contains a *second* list of Convention resolutions, dating from earlier in the summer, and presumably made for his own use; that he was permitted to take them perhaps indicates something of his standing within the Convention.)

On six smaller pages, bound together into a signature, Wilson has listed twenty-five provisions that McLaughlin and Farrand identified as coming from the Pinckney Plan. There are a couple of other, smaller and relatively insignificant sheets, and a half-folio page, written on both sides, containing extracts from the New Jersey and the Pinckney plans.

The most important documents are two drafts of the Constitution. Both are written on folio sheets that have been folded to make four-page signatures. The first draft, which originally consisted of three signatures, is missing its middle signature; the last is nearly identical to the final report of the Committee.

It is important to stress just how little we know about the internal workings of the Committee. We do not know exactly

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49. 1 CONVENTION RECORDS, *supra* note 2, at 17 (May 29); 2 CONVENTION RECORDS, *supra* note 2, at 107 (July 25).

how the Convention viewed their charge—whether they were expected simply to write up the existing resolutions, or expected also to add substantive provisions. The few scraps of information—e.g., Washington’s diary entry mentioned above—point to the first interpretation, but are inconclusive.<sup>50</sup> Nor can much be inferred from the name, “Committee of Detail”: to call something a detail is not necessarily to say it is unimportant. We do not know where the Committee met, or when, or how often; we do not know whether there were heated internal debates, nor how they would have been resolved. It is certain that some Wilson documents have gone missing; and if Rutledge or Ellsworth or Gorham kept notes or records, they have not survived.

Two of the surviving documents—the Randolph draft and the final Wilson draft—contain extensive annotations by Rutledge; numerous provisions have also been checked off, both here and in the earlier Wilson draft. Many historians have inferred that the check marks are Rutledge’s: that he presided over the meetings and made the insertions as the Committee discussed the successive drafts. But other papers in the Wilson archive bear similar check-marks. They are most likely his, and not Rutledge’s.<sup>51</sup>

At this stage, a warning is in season. It is important not to leap from these facts to a tempting and obvious conclusion. Almost all of the early drafts of the Constitution are in Wilson’s hand. Even the Randolph draft contains Wilson’s check marks. He was a powerful member of the Convention, a skilled legislative draftsman, and possessed remarkable energy. Many historians have inferred that he must have utterly dominated the proceedings: in Brant’s phrase, that it was a Committee of “Wilson and four others.” But that is too hasty. In the first place, from the fact that most of the surviving documents are in Wilson’s hand, nothing whatsoever can be inferred; and indeed, many provisions that he strongly and consistently opposed appear for the first time in his drafts. It was Rutledge, not

50. *Supra* note 15. Or again, the delegate Hugh Williamson wrote to James Iredell on July 22 that “After much labor the Convention have nearly agreed on the principles and outlines of a system, which we hope may fairly be called an *amendment* of the Federal Government. This system we expect will, in three or four days, be referred to a small committee, to be properly dressed . . .” 3 CONVENTION RECORDS, *supra* note 2, at 61.

51. I owe this observation to Lorianne Updike Toler. The most reasonable conjecture is that the check marks were made by Wilson in the course of writing up the next draft: he would have wished to be sure that all of Randolph’s points were included.

Wilson, who ultimately presented the Committee's report to the Convention; and as we shall see, on many issues, Wilson, far from being dominant, appears to have been outflanked by Rutledge and the others. But there is a further point. Anybody who has attempted to work with the manuscripts quickly comes to recognize Randolph's legible but uneven scrawl, and to dread the wild and idiosyncratic jottings of Rutledge. Wilson, in contrast, displays excellent penmanship. He wrote an elegant cursive: quite possibly for this reason he was chosen as the Committee amanuensis.

The issues here are complex and require careful analysis. In particular, it is necessary to try to reconstruct, so far as is possible, the exact sequence of the internal workings of the Committee.<sup>52</sup> That involves, as a first step, closely inspecting the various documents, placing them in chronological order, and observing which provisions were added at which stage. One then wants to try to reconstruct *who* is likely to have been responsible for which provisions and that involves careful crosschecking. The basic principles are as follows. (1) If Madison's *Notes* show that, on the floor of the Convention, a provision was opposed by one of the Committeemen, either before or after the Committee did its work, that is good *prima facie* evidence that the provision was the handiwork of somebody else: *mutatis mutandis* if the Committee member spoke in favor of the provision. It should be emphasized that this evidence is only *prima facie*: delegates must often have made arguments, not on their own initiative, but in support of an ally, or from some other tactical calculation. It should also be emphasized that our evidence is extremely incomplete and that one cannot always confidently infer from what Madison reports as having been said on the floor to what a member did in Committee; but the more frequent and more emphatic the declarations on the floor, the more confidence we are entitled to place in the inference. (2) One needs also to make use of whatever is known about the general biographical backgrounds of the Committee members, about their general political views, and about the views of their state delegations; but in the nature of things, that evidence is less probative than

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52. It is odd that the task has apparently not been attempted in a sustained manner before. Exemplary in this regard is CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY* 94-104 (1922). Although Thach's discussion is confined to the executive branch, he clearly understands the methodological issues, and he devotes ten insightful pages to the Committee of Detail. He is careful in his inferences, and careful, too, to try to establish the individual views of the Committee members as expressed on the floor of the Convention.

evidence from the Convention itself. (One thinks of Madison, whose views shifted dramatically over the years.) (3) It is of course necessary to pay close attention to the materials formally entrusted to the Committee by the Convention—*viz.*, the Convention resolutions and the New Jersey and Pinckney plans. But one must also consider other documents which they had at their disposal and of which they certainly made use—notably the Articles of Confederation, but also the Constitutions of the states (especially New York, Massachusetts, and Virginia). Much of the specific language of the Committee Report was taken from these sources.

Let us now examine the documents and attempt to reconstruct, so far as is possible, the sequence of events within the Committee.

#### B. DOCUMENTS I, II, AND III

I begin with a terminological point. Jameson and Farrand confronted a number of scattered pieces of paper relating to the Committee of Detail. They were able to work out the chronological sequence: as we shall see, the internal evidence is compelling. In the *Records*, Farrand arranged this material into a sequence of documents, which he numbered I through IX. Not all of these documents can be regarded as a “draft of the Constitution”—that is, as a fully articulated scheme of national government. I shall therefore speak of the nine *documents*, reserving the term *draft* for the more substantial items in the list.

About Document I there is not much to say. It is a list, entirely in Wilson’s handwriting, of the resolutions of the Convention up to July 23. The content is no surprise: a three-branch national government, with a bicameral legislature in whose second chamber each state shall have two votes, with its lower chamber elected in proportion to population, and with a broad grant of national legislative power.

Farrand supplemented Wilson’s list with his own brief Document II, which lists the Convention resolutions taken on July 24-26, i.e. between the appointment of the Committee and its first meeting.

Document III is the longer of Wilson’s two sets of extracts from the Pinckney Plan and was discovered by Andrew McLaughlin.<sup>53</sup> Farrand doubtless placed it at this point in the

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53. Note, *supra* note 24.

sequence because he knew that the Pinckney Plan, submitted to the Convention on May 29 and promptly tabled, had been referred to the Committee. However, that original document would have been in Pinckney's handwriting, not in Wilson's; and it is not even clear that this particular set of extracts belongs to the work of the Committee of Detail. It is physically different from the other Wilson manuscripts: a small, bound signature, whereas the other documents are written on folio sheets. It is entirely possible that this Document was made at some other time, possibly as early as mid-May, when Pinckney was attempting to interest other delegates in his scheme.<sup>54</sup> The Pinckney Plan, in any case, raises subtle issues that I shall postpone to another occasion.

### C. DRAFT IV

#### 1. Overview

The next document—Farrand's Document IV—is considerably longer.<sup>55</sup> It has a good claim to be the first draft of the Constitution, *stricto sensu*. It is almost entirely in the hand of Edmund Randolph, with annotations by John Rutledge.

As I noted earlier, the committee—Gorham (Massachusetts), Ellsworth (Connecticut), Wilson (Pennsylvania), Randolph (Virginia), and Rutledge (South Carolina)—was evidently chosen with an eye to geographical balance. Why was Randolph selected from Virginia, and not Madison? A number of factors no doubt played a part. In the first place, Randolph was a Randolph of Virginia, at the time probably the most socially prominent family in the nation. (Jefferson's own aristocratic pedigree came through his mother's connection to the Randolphs: not through the Jefferson line). He was, in addition, the Governor of the largest and most influential state in the Union; he was an eminent lawyer; and he had formally presented the Virginia Plan to the Convention. Indeed, the other delegates, who frequently referred to "Mr. Randolph's plan," may well have assumed that Randolph (rather than the more junior Madison) was the author: a point on which Madison appears to have been sensitive in his later years.<sup>56</sup> But regardless of what the

54. See, e.g., 3 CONVENTION RECORDS, *supra* note 2, at 25 (May 21) and 39 (June 10) for indications that Pinckney was circulating his plan.

55. Transcribed at COMMITTEE DOCUMENTS, *supra* note 20, 263–85.

56. Madison, as he revised his *Notes* for publication, took pains to ward off such a misunderstanding and explicitly pointed out that he had conveyed to Randolph before



delegates thought, in terms of parliamentary procedure the assignment of the Committee of Detail was to revise the plan Randolph had submitted on May 29, as modified first by the Committee of the Whole and then by the Convention. (The delegates were sensitive to these parliamentary distinctions, and when the Committee of the Whole formally reported to the Convention, or the Convention committed matters to the Committee, it was always made clear that the discussion referred to the “plan of Mr. Randolph.”<sup>57</sup>) These facts are adequate to explain his presence on the Committee; and with Randolph of Virginia on, Madison of Virginia was necessarily off.

There can be no doubt that Document IV dates to late July, for it incorporates the “Connecticut compromise” of July sixteenth. Randolph had vehemently and repeatedly opposed that result. We can therefore conclude that the document is not a private record of his own constitutional preferences. It is also easily seen to antedate the various Wilson drafts, which incorporate verbatim numerous items from the Randolph document, but then go on to add further provisions. For all these reasons, Document IV can be confidently assigned to the time either just before or just after the Committee began to meet. Whether it should be viewed as a product of the deliberations of the Committee is a more difficult question which I shall discuss in due course.

## 2. Randolph and Mason

I mentioned that the document itself was discovered among the papers of George Mason.<sup>58</sup> How Randolph’s draft of the Constitution came to be located in Mason’s papers is unknown. But Randolph and Mason had a great deal in common. Both were descendants of aristocratic Virginia families. Although Randolph was nearly thirty years younger than Mason, they had known each other and worked together since the early days of the Revolution. Beyond that, at the end of the Convention they were to be the two great “recusants” from Virginia. They refused

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the Convention the central ideas of the Virginia Plan. See 9 THE PAPERS OF JAMES MADISON 383 (April 16, 1787) (Robert A. Rutland et al. eds., 1975) [hereinafter MADISON PAPERS].

57. For representative instances, see 1 CONVENTION RECORDS, *supra* note 2, at 238 (June 13), 240 (June 14), 242 (June 15), 249 (June 16), 282 (June 18) and 322 (June 19).

58. I note in passing that although George Bancroft consulted papers that were in the hands of George Mason’s son, he does not appear to have seen the Mason papers in Philadelphia that contained the Randolph manuscript; at any rate, that manuscript is not mentioned anywhere in BANCROFT, *supra* note 19.

to sign the Constitution and in the process nearly scuttled its ratification—a fact that severely (and, in the case of Mason, irreparably) strained their relations with Washington.<sup>59</sup> The trajectory of their relationship is complex. At the time of the refusal to sign—i.e., in the last days of the Convention—they were close allies; and it is a reasonable conjecture that this is the moment at which Randolph shared his draft with Mason, possibly in preparation for the ratification debates. But when Randolph some weeks later decided after all to support ratification, Mason felt betrayed and began to refer to Randolph as “young A---d” (i.e. “Arnold”).<sup>60</sup> Randolph’s *History of Virginia*, written around 1808 after Mason’s death, was more generous to the older man.<sup>61</sup> But beyond all these facts there is a further deep appropriateness that the first draft of the Constitution should have found its way into the papers of George Mason—and also a certain deep irony.

To understand this document, it is important to begin by considering the way in which the project of drafting a Constitution would have presented itself to the members of the Committee. The basic structure of American constitutions in fact goes back to the work of George Mason eleven years earlier. On May 10, 1776 the Continental Congress instructed the colonies to organize new governments. On May 15, probably before knowing of this vote, the Virginia Convention appointed a committee to draft a bill of rights and a constitution. The committee was large, unwieldy, and, as Mason said, “over-charged with useless members.”<sup>62</sup> Partly to expedite matters and partly to ward off the “thousand ridiculous and impracticable proposals”<sup>63</sup> he expected it to produce, he went to work on his own. He must have worked with astonishing speed. We do not know exactly when he finished. But on May 27—just eight days after his

59. For a thorough account of their activities during the ratification debates, see PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 216, 242, 318–19 (2010). Washington attributed Mason’s recusal to “pride . . . and . . . want of manly candor” (Washington to James Craik, Sept. 8, 1789), and shortly before Mason’s death referred to him as “my neighbor and quondam friend” (Washington to Hamilton, July 29, 1792).

60. ROBERT A. RUTLAND, *GEORGE MASON, RELUCTANT STATESMAN* 103 (1961).

61. EDMUND RANDOLPH, *THE HISTORY OF VIRGINIA* 255 (reprinted in 1970) (1808).

62. 1 *THE PAPERS OF GEORGE MASON* 271–72 (Robert A. Rutland ed., 1970) [hereinafter *MASON PAPERS*] (transcribing a letter sent by George Mason to Richard Henry Lee). The most thorough general biography of Mason is JEFF BROADWATER, *GEORGE MASON, FORGOTTEN FOUNDER* (2006).

63. 1 *MASON PAPERS*, *supra* note 62, at 271.

appointment to the Committee—his draft had been debated by the Committee, modified, voted upon, and referred back to the full Convention. The Committee report on a Declaration of Rights was published in the Virginia newspapers on June 1 and appeared in Philadelphia on June 6: that is, less than a month after the initial vote of Congress.<sup>64</sup>

Meanwhile, Mason turned his attention to the Virginia Constitution. He presented a draft to the Committee by June 10; after some debate, a revised version was ordered to be printed, and was formally reported to the Convention on the 24th. (Mason's drafts have been lost, so it is not known how extensively the Committee revised his original scheme.) By July 4, 1776, his work had been widely distributed throughout the United States; and it provided the pattern for most of the state constitutions that were to follow.<sup>65</sup> Mason's work during these few weeks was one of the most remarkable episodes of the Revolution, fully comparable in importance to Jefferson's simultaneous writing of the Declaration of Independence, and at least as influential.<sup>66</sup>

Within a few years, all American states had enacted constitutions of their own. Most followed Mason's structure: first, a lengthy *declaration of rights* (usually copied more or less directly from Mason); this was followed by what was typically called a *frame of government*.<sup>67</sup> The frame of government was invariably organized into a four-part sequence: legislature, executive, judiciary, and miscellaneous provisions. The nomenclature is not constant. Sometimes, the word "constitution" is employed to

64. *Id.* at 274–91.

65. The surviving drafts of the Virginia Constitution and careful editorial commentary are provided in *id.* at 295–310. Both Madison and Jefferson, by the middle 1780s, were critical of the Virginia Constitution for its inequality in representation, for its property qualification for voting rights, and for its clumsy executive council. *Id.* at 310.

66. It should be remembered—as emphasized in PAULINE MAIER, *AMERICAN SCRIPTURE* 160–70 (1997)—that Jefferson's Declaration did not achieve its iconic status until decades later, after Jefferson had grown into the towering figure of early nineteenth-century politics: originally, the Fourth of July was celebrated to commemorate the fact of separation from Britain rather than the document. For the first decades after Independence, Mason's work, and particularly his Bill of Rights, was considerably more influential than Jefferson's Declaration; it was to provide the pattern for all subsequent bills of rights, both domestically and overseas, and notably for the French *Declaration of the Rights of Man and Citizen*.

67. The most convenient source for the early state constitutions is unfortunately still the collection edited by Francis Newton Thorpe. A new edition is badly needed. *THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* (Francis Newton Thorpe ed., 1909).

designate both the declaration (or “bill”) of rights and the frame (or “form”) of government; but sometimes it is used to designate the frame alone. Some of the early 1776 constitutions incorporate a list of grievances, more or less copied from the Declaration of Independence, against the King; most do not. Sometimes (as in the Massachusetts Constitution of 1780), the bill of rights is further subdivided into a “preamble” and a “declaration”; sometimes (as in New York) a bill of rights is omitted altogether.

### 3. Randolph’s Background

I shall return to these facts and to George Mason later: they turn out to be important for understanding the Randolph draft. For now, it is important to understand something of the personality of Edmund Randolph.<sup>68</sup> He was descended from the most prominent family in Virginia; his father and great-grandfather were both distinguished lawyers; his uncle and grandfather both served in the colonial government as Attorney General. On the outbreak of revolution, his father remained loyal to the crown and ultimately took sail for England; his uncle, in contrast, became a leader of the revolutionary forces. Edmund cast his lot with his uncle. In the years leading up to 1787 he had held a variety of positions: aide-de-camp to George Washington, a member of the Continental Congress, a member of the Virginia legislature, Attorney General of Virginia, and (from November, 1786) Governor. He had established himself as one of the most prominent lawyers in Virginia, with a thriving practice and with experience in litigating cases of public significance. Unlike most Virginia aristocrats, he was a lawyer rather than a planter, and had little personal stake in the institution of slavery. Like the rest of the Virginia delegation, he appears to have assumed and hoped that slavery would eventually wither away.<sup>69</sup> He was one of the principal organizers of the Annapolis conference and instrumental in persuading Washington to attend the Philadelphia convention. He was clearly a man of great intelligence and practical experience. But, unlike Madison, Hamilton, or Wilson, he displays little interest in abstract questions of political philosophy. He also changed his mind often during the convention, and it is this fact which makes

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68. See generally JOHN J. REARDON, *EDMUND RANDOLPH: A BIOGRAPHY* (1974).

69. This matter is discussed *infra* note 155 and accompanying text.

it especially difficult to work out his precise views during the Committee of Detail.

For the first weeks of the summer, as the Convention debated what he no doubt thought of as the Randolph proposals, he appears to have been an enthusiastic if somewhat dogmatic participant, occasionally intervening with warnings against the excesses of democracy and “the demagogues of the popular branch.”<sup>70</sup> He was hostile to Wilson’s idea of a single executive, calling it “the foetus of monarchy.”<sup>71</sup> During the “great debate” he was adamantly on the side of Madison and Wilson. But after the defeat of July 16, his mood appears to have soured, and over the remainder of the summer his remarks (if Madison’s *Notes* accurately capture their spirit) grew increasingly cantankerous.<sup>72</sup> By August 29 he was saying “that there were features so odious in the Constitution as it now stands, that he doubted whether he should be able to agree to it.”<sup>73</sup>

Such remarks set his new tone. From this point forward, he routinely threatened to vote against the document, curtly declared his “inflexible” opposition; and, having already denounced democracy, now expressed his fear that the Constitution was tending towards monarchy and aristocracy.<sup>74</sup> And in the end, of course, he did refuse to sign the Constitution.

But then he exhibited another aspect of his personality. Did his refusal to sign mean that he would oppose ratification? Not at all, he assured the Convention. He “did not mean by this refusal to decide that he should oppose the Constitution without doors. He meant only to keep himself free to be governed by his duty as it should be prescribed by his future judgment.”<sup>75</sup> After further reflection, he changed his mind again, and supported the

70. Randolph made remarks of this tenor on May 29, May 31, and June 12; his remarks about democracy occur in 1 CONVENTION RECORDS, *supra* note 2, at 26–27 and 51; the remark about “demagogues” occurs in *id.* at 218.

71. *Id.* at 65–66 (June 1).

72. In the immediate aftermath of the vote of July 16, having found his own suggestions for a compromise rejected, he said “he wished the Convention might adjourn, that the large States might consider the steps proper to be taken in the present solemn crisis of the business . . .” 2 CONVENTION RECORDS, *supra* note 2, at 18 (July 16). Challenged and asked whether he meant an adjournment *sine die*, he retreated and said he only meant for the rest of the day. *Id.*; see also REARDON, *supra* note 68, at 101–36 (providing copious documentation of Randolph’s growing irritability).

73. 2 CONVENTION RECORDS, *supra* note 2, at 452 (August 29). Randolph was speaking in support of Charles Pinckney who had moved for a two-thirds supermajority for all laws regulating commerce; in Randolph’s eyes, “[a] rejection of the [Pinckney] motion would compleat [*sic*] the deformity of the system.” *Id.*

74. *Id.* at 513 (September 5).

75. *Id.* at 645 (September 17).

Constitution during the ratification debates. Randolph, in other words, for all his brilliance, was highly unpredictable: and his contemporaries noticed. His cousin, John Randolph of Roanoke, described him as “the chameleon on the aspen, always trembling, always changing.”<sup>76</sup> For these reasons, despite his presentation of the Virginia plan, he has generally been ranked by historians as one of the more disappointing delegates to the Convention, an erratic figure who made few original contributions. But a close inspection of his work on the Committee of Detail tells a different story.

#### 4. The Randolph Draft

Let us now turn to the text of Document IV itself. Randolph’s draft is long (nine pages in manuscript, filling twelve pages in Farrand’s printed transcription—far longer than the three printed pages of Convention Resolutions). He incorporates the substance of the Resolutions, but adds many new items that had not previously been discussed. It would be tedious and not especially helpful to compile a detailed list; the main points can be summarized as follows.

The bulk of his additions can be classified as “minor matters”—that is, items that needed to be stipulated in a completed Constitution, but that did not demand the attention of the assembled delegates and that were unlikely to provoke prolonged discussion. Examples are: the privilege of members of the legislature from arrest; the manner of filling legislative vacancies; the rules for quorums and adjournments; the use of the terminology (taken from the Virginia Constitution) “House of Delegates” and “Senate.” Most of these provisions were drawn either from the Articles of Confederation or from the state constitutions. (Randolph explicitly mentions his use of the Constitution of New York; but the influence of the constitutions of Massachusetts and Virginia is also evident.<sup>77</sup>) There are also a

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76. 2 WILLIAM CABELL BRUCE, JOHN RANDOLPH OF ROANOKE 202 (reprint 1970) (1922). Precisely these personality traits were to lead to Randolph’s eventual disgrace at the time of the Jay Treaty; the well-known story is told by STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 424–31 (1993). They describe Washington’s fury, and quote Madison’s remark that even Randolph’s “best friends can’t save him from the self-condemnation of his political career as explained by himself.” *Id.* at 431. Knowledge of these dramatic later events may have colored historians’ views of Randolph at the Convention.

77. 2 CONVENTION RECORDS, *supra* note 2, at 139; COMMITTEE DOCUMENTS, *supra* note 20, at 267 (cancelled reference to “the 16th. article of the New York constitution”). Madison decades later noted the influence of the Virginia Constitution; 3

few changes to the Convention resolutions that probably represent unintended slips.<sup>78</sup> Nobody is likely to have objected to these minor contributions: this was a job the Committee was expected to perform. And it may be that the Convention delegates expected the Committee to go no further.

Other matters, however, are more problematic. To facilitate comparisons between drafts, I shall arrange the discussion into the standard sequence: legislature, executive, judiciary, and miscellaneous.

#### a. The Legislature

##### 1) Property Qualifications

On the last day before its recess, the Convention debated the question of property qualifications for members of the national government.<sup>79</sup> Wilson on principle opposed restrictions of this sort; but he spoke only briefly.<sup>80</sup> Two other members of the Committee—Gorham and Ellsworth—favored leaving the question to the legislature. The discussion filled most of the day; in the end, the Convention ordered the Committee to require “certain qualifications of property” for members of the national legislature, executive, and judiciary.<sup>81</sup> Randolph (who approved of such restrictions) evidently struggled with this charge. He

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CONVENTION RECORDS, *supra* note 2, at 528.

78. For instance, Randolph’s draft gives the minimum age for senators as 25. COMMITTEE DOCUMENTS, *supra* note 20, at 269. The Convention resolutions had specified 25 as the minimum age for representatives and 30 for senators. This was entirely in keeping with Randolph’s view of the more august nature of the Senate, and the error was rectified in subsequent drafts.

79. 2 CONVENTION RECORDS, *supra* note 2, at 120–25 (July 26). The provision appears in Randolph’s draft. *Id.* at 139–40. Randolph did not speak to the issue in the Convention debate. But property qualifications for legislators are found in most of the contemporary state constitutions, and were evidently favored by the Convention; Randolph’s remarks on the nature of the Senate (as expressed especially on May 31, but also on May 29 and June 12) leave little doubt that he would have voted in favor of George Mason’s motion.

80. Thus, for example, he declared himself against age restrictions, stating that he “was agst. abridging the rights of election in any shape. It was the same thing whether this were done by disqualifying the objects of choice, or the persons chusing [*sic*].” 1 CONVENTION RECORDS, *supra* note 2, at 375 (June 22). I infer from the vote of the Pennsylvania delegation that Wilson voted against Mason’s motion for property requirements. See 2 CONVENTION RECORDS, *supra* note 2, at 121–25 (July 26).

81. 2 CONVENTION RECORDS, *supra* note 2, at 134. The measure passed by a vote of 10-1. *Id.* at 124. It read (as amended): “Resolved That it be an instruction to the Committee . . . to receive a clause or clauses, requiring certain qualifications of property and citizenship in the United States for the Executive, the Judiciary, and the Members of both branches of the Legislature of the United States.” *Id.* at 134.

listed a number of possible restrictions on electors, which he then crossed out;<sup>82</sup> added a property qualification for Senators, but without attempting to specify an exact amount; and omitted to include any qualification for the executive or judiciary.

## 2) Senatorial Dominance

More importantly, the Draft reflects a conception of a powerful Senate. This is in keeping with the vision of Madison and of the Virginia Plan; and in the aftermath of the “Connecticut compromise” of July 16, this was something which the small-state delegates could now support. The Randolph Draft in particular gives to the Senate the power to make treaties of commerce, peace, and alliance; to appoint ambassadors; and to appoint the judiciary.<sup>83</sup> Only the last of these powers had previously been voted upon by the Convention.<sup>84</sup> The addition of the powers over foreign affairs is new and appears to be Randolph’s own interpolation: clearly, he is no longer following the script. Wilson in particular would have disagreed with giving the Senate these powers, which he repeatedly argued should be exercised by the President.<sup>85</sup> (Indeed, even months later, in the Pennsylvania ratification convention, he noted that he was “not a blind admirer of this system”—and indicated in particular that he objected to the Senate’s appointment and treaty powers. However, he consoled himself that, because those powers were now shared with the

82. For electors, Randolph listed several possible restrictions: citizenship, manhood, sanity of mind, residency in the state for one year, service in the militia, as well as possession of real property—these items are then crossed out. *Id.* at 139–40; COMMITTEE DOCUMENTS, *supra* note 20, at 269. In the margin, Rutledge has written, “These qualifications not justified by the resolutions.” (Rutledge is correct: the resolutions dealt with qualifications for national office, not with qualifications for electors.) Rutledge’s own comment has then been cancelled.

83. 2 CONVENTION RECORDS, *supra* note 2, at 144–45; COMMITTEE DOCUMENTS, *supra* note 20, at 277. The power to send ambassadors has been added in Rutledge’s hand.

84. See 1 CONVENTION RECORDS, *supra* note 2, at 119–20 (June 5) and 232–33 (June 13) (describing the debates and votes on the appointment of the judiciary). The Convention resolutions provided for the Senate to appoint the justices of the Supreme Court, and for the national legislature to “appoint inferior Tribunals.” “Appoint” here is ambiguous, and may merely mean “create”; this would be in accordance with the actual vote of June 5. See 1 CONVENTION RECORDS, *supra* note 2, at 125–26 (June 5). In any case, the resolutions made no explicit provision for the specifically Senatorial appointment of lower federal judges. 2 CONVENTION RECORDS, *supra* note 2, at 132; COMMITTEE DOCUMENTS, *supra* note 20, at 245–47.

85. Wilson expressed his views repeatedly at the Convention, both before and after the meetings of the Committee of Detail. See, e.g., 1 CONVENTION RECORDS, *supra* note 2, at 119 (June 5); 2 CONVENTION RECORDS, *supra* note 2, at 538 (September 7).



President, the Senate “can only show its teeth, it is unable to bite or devour.”<sup>86</sup>)

### 3) Enumeration of Powers

The Randolph Draft also introduced an enumeration of eighteen specific powers of the national legislature.<sup>87</sup> The Convention had at various points discussed the desirability of an enumeration, but had not itself drawn up any such list. Instead, it adopted a resolution which reached the Committee of Detail in the following language:

Resolved That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.<sup>88</sup>

The language of this resolution does not itself settle the question of whether there was to be an enumeration. The issue is highly complex; it needs to be considered in conjunction with the Necessary and Proper Clause, and I shall return to it when discussing Document IX.

The majority of the enumerated powers appear in Randolph’s handwriting: the power to tax, and to regulate commerce; to make war and equip armies; to provide tribunals for offenses against the laws of nations; to declare the law of piracy; to establish post offices; to declare the law of treason; to regulate the state militias; to regulate naturalization. In the margins, Rutledge has added some further powers: over Indian affairs; the power to regulate weights and measures; to borrow money; to enforce treaties.

Where did the enumerated powers come from? Most were drawn from the enumeration in the Articles of Confederation. Randolph furthermore made explicit the powers to tax, to regulate commerce, and to raise an army and navy. But the addition of these powers would not have been controversial;

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86. 3 CONVENTION RECORDS, *supra* note 2, at 162.

87. 2 CONVENTION RECORDS, *supra* note 2, at 142–44; COMMITTEE DOCUMENTS, *supra* note 20, at 273.

88. 2 CONVENTION RECORDS, *supra* note 2, at 131–32; COMMITTEE DOCUMENTS, *supra* note 20, at 245. This language had been adopted by the Convention on July 17. 2 CONVENTION RECORDS, *supra* note 2, at 21.

indeed, they were virtually the *raison d'être* of the Convention. The power to regulate naturalization appears to be his own contribution.

Ironically, although it appears to have been Randolph who first produced the enumeration of powers, and although the Convention in essence adopted his handiwork, he was in the end to list the “indefinite and dangerous power given by the Constitution to Congress” as one of his principal reasons for refusing to sign.<sup>89</sup> I shall come back to the point later.

#### 4) The “Deep South” Provisions

Most strikingly, Document IV, as part of its enumeration of powers, inserted three provisions entirely for the benefit of the South, and especially the deep South.<sup>90</sup> These provisions were to cause considerable controversy when they were debated in August; and they had not been discussed in Convention before the meeting of the Committee of Detail. How were they introduced and by whom?

Here it is helpful to have a sense of the physical appearance of the manuscript. It consists of nine pages, written on five physical sheets. The first eight pages are written on the recto and verso sides; the final page on the recto side of a sheet of its own.<sup>91</sup> On the first four pages there are three or four slight interventions in the hand of Rutledge. Then, on page five, when the powers of Congress are enumerated, and for two pages thereafter, his interventions are frequent and conspicuous; and the “deep South” passages are among those Rutledge most heavily edited.

From the fact that he presented the final report to the Convention and that his annotations are found on several of the

89. 2 CONVENTION RECORDS, *supra* note 2, at 631 (September 15). Randolph's other major comments on enumeration occur at 1 CONVENTION RECORDS, *supra* note 2, at 53; 2 CONVENTION RECORDS, *supra* note 2, at 26, 488–89, 563–64. I note that his September 15 opposition is likely not to the enumeration of powers itself, but to the Necessary and Proper Clause, which he opposed. *Id.* at 563 (September 10) (“Mr. Randolph took this opportunity to state his objections to the System. They turned . . . on the general clause concerning necessary and proper laws . . . .”). See *infra* text accompanying notes 175–207.

90. These controversial provisions occur on Randolph's fifth sheet. 2 CONVENTION RECORDS, *supra* note 2, at 143; COMMITTEE DOCUMENTS, *supra* note 20, at 273.

91. The pages have been numbered in pencil at the top of the page, presumably by an archivist at the Library of Congress. As discussed below (*infra* note 127 and accompanying text), the final sheet could arguably also be assigned to the beginning; but this subtlety is irrelevant to the present discussion.

drafts, Rutledge is generally assumed to have been the chairman of the committee and to have presided over its sessions. It is also generally assumed (no doubt correctly) that he was centrally involved in the “deep South” passages. He was himself a considerable slaveowner and vigorously defended the interests of the slave states in the Convention debates; moreover, as the Committee member from South Carolina, he undoubtedly reminded his colleagues that General Pinckney had threatened to vote against any report that did not protect slavery. From these various facts it has often been concluded that Rutledge dominated the proceedings and even that he “hijacked the Constitution.”<sup>92</sup> But the documents tell a more complex story.

Document IV contains three “deep South” provisions. The first prohibits Congress from taxing exports. This clause appears in Randolph’s hand, immediately after the clause granting Congress the power to tax. Next to this restriction, Rutledge has written “agrd.”; but whether the agreeing was by Rutledge or by the full Committee is impossible to say. This issue had received little attention in the opening weeks of the Convention.<sup>93</sup> But on July 12 General Pinckney argued that, if South Carolina’s slaves were not to count fully towards representation in Congress, then the fruits of their labor—i.e. exports—should not be taxed;<sup>94</sup> and when the Committee of Detail was appointed he bluntly announced that he would vote against any report that did not prohibit such taxes.<sup>95</sup> The delegations from the deep South were solidly on his side; Virginia was split, with Madison opposing him, and Mason in favor.<sup>96</sup> Randolph appears to have agreed (or at least to have thought it necessary to accommodate him); and a few lines below “No taxes on exports,” he repeats the point and writes, “no Duty on exports.” Rutledge then inserts a further prohibition: “no State to lay a duty on imports.” This, too, would prevent the northern states from imposing a duty on southern goods.

Secondly, Randolph added a further provision that had so far not even been mentioned: a requirement that any navigation

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92. See STEWART, *supra* note 45 and accompanying text.

93. I note in passing that both Hamilton and Gouverneur Morris appear to have assumed that export taxes would be permitted. See 1 CONVENTION RECORDS, *supra* note 2, at 286, 592.

94. *Id.* at 592 (July 12).

95. *Supra* note 14 and accompanying text.

96. For the deep South, see 2 CONVENTION RECORDS, *supra* note 2, at 307 (giving the views of Hugh Williamson); see also *id.* at 374 (giving the views of Pierce Butler); *id.* at 306–07 (giving the views of Madison); *id.* at 305–06 (giving the views of Mason).

act (i.e., any act regulating imports and exports) be passed by a supermajority of each chamber of the legislature. The evident fear was that the northern states (who dominated the shipping industry) would use navigation acts to the disadvantage of southern exporters: the supermajority requirement would ward off that particular threat.<sup>97</sup> This navigation act provision appears to have been a particular hobbyhorse of Randolph's. At any rate, as late as August 29—even after the delegation from South Carolina had thrown in the towel—he was still hotly arguing the point.<sup>98</sup> Wilson, in contrast, explicitly opposed this supermajority requirement, as he opposed supermajority requirements generally.<sup>99</sup> Indeed, in this one instance Rutledge intervenes actually to *reduce* Randolph's supermajority requirement.<sup>100</sup> We may infer that Randolph introduced it into the draft on his own initiative.

The third provision, connected to the other two, was brief. In his original formulation, Randolph had written, “no prohibitions on Importations of inhabitants. no duties by way of such prohibition.” This was of course a veiled reference to the slave trade. Rutledge intervened to make the prohibition more explicit, interlineating and changing the first clause as follows: “no prohibition on ~~such~~ ^ye^ Importations of ^such^ inhabitants ^or People as the sevl. States think proper to admit^.”<sup>101</sup> This provision, too, had not previously been discussed in the Convention, and was a major concession to the interests of the deep South. It also raises a perplexing question about Randolph. When, on August 22, a version of the slave clause he himself had drafted was debated in Convention, Randolph actually opposed it, and sought a compromise:

He dwelt on the dilemma to which the Convention was exposed. By agreeing to the clause, it would revolt the Quakers, the Methodists, and many others in the States having no slaves. On the other hand, two States [i.e. South Carolina and Georgia] might be lost to the Union.<sup>102</sup>

97. See 2 CONVENTION RECORDS, *supra* note 2, at 449–52.

98. See *id.* at 452–53 (“Mr. Randolph said that there were features so odious in the Constitution as it now stands, that he doubted whether he should be able to agree to it.”).

99. 2 CONVENTION RECORDS, *supra* note 2, at 451.

100. Randolph had originally required an affirmative vote of 11 states; Rutledge changed this to two-thirds.

101. 2 CONVENTION RECORDS, *supra* note 2, at 143; COMMITTEE DOCUMENTS, *supra* note 20, at 273. (The words between carats are interlineations in Rutledge's hand.)

102. 2 CONVENTION RECORDS, *supra* note 2, at 374.

Not himself a plantation owner, he had no great personal stake in the survival of slavery; and this makes it somewhat curious that the slavery provision should first arise in his handwriting. Perhaps, in the wake of subsequent controversy, he revised his position; or perhaps he originally inserted the provision in response to pressure from the South Carolinians. We do not know.

I shall return later to these three “deep South” provisions and their implications for the internal dynamics of the Committee. For now, I merely note that the principal elements all make their first appearance in the handwriting of Randolph; and that, although Rutledge intervened to adjust the language, he did not greatly alter the substance.

So far, we have seen that Document IV, far from simply “tidying up” the work of the Convention, has introduced several far-reaching changes to the powers of the legislature. Contrary to the view that Rutledge “hijacked the Constitution,” the pro-slavery provisions make their first appearance in the handwriting of Randolph. And, contrary to the view that Wilson dominated the proceedings, none of the changes so far can be ascribed to his agency.

There is here a more general question. Is the initial Randolph draft his own handiwork or the product of Committee debate? Are the Rutledge annotations to be interpreted as the views of Rutledge or were they added in the course of Committee discussions? I shall return to these questions after we have proceeded through the entire document; for now, I merely note the importance of not leaping from the handwriting to conclusions about ultimate authorship.

#### b. The Executive

The treatment of the presidency in the Randolph draft is subtle and requires close attention.<sup>103</sup> We can begin by noticing the views of the committee members as expressed in the general debates. Both Randolph and Rutledge were hostile to a strong executive. Although Rutledge supported Wilson’s proposal for a single executive, he did not wish the president to appoint members of the judiciary, and he vigorously argued that he be elected by the legislature.<sup>104</sup> Randolph was even more skeptical,

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103. I have been helped here by the superb study, THACH, *supra* note 52, at 105–39, which devotes its fifth chapter principally to the Committee of Detail.

104. See 1 CONVENTION RECORDS, *supra* note 2, at 65 (June 1) (supporting Wilson

wishing to limit the executive to a single term, and denouncing Wilson's single executive as "the foetus of monarchy."<sup>105</sup> (He preferred a three-member executive.) Gorham is somewhat opaque. He did not speak often enough on the topic for his views to be ascertained; but he, too, favored senatorial rather than presidential appointment of the judiciary.<sup>106</sup> Finally, Ellsworth supported the selection of the president by an electoral college (rendering him independent of the legislature); but he, like the other four, favored senatorial appointment of the judiciary.<sup>107</sup> Thus on the topic of the executive Wilson was isolated.

The treatment of the executive in Document IV cannot be considered independently of the treatment of the Senate. Roughly speaking, in the Convention at this stage of the proceedings there were two primary conceptions of executive authority, which we can call the *senatorial* and the *presidential*. On the first conception, the senate would wield many traditionally executive functions: appointing ambassadors; appointing judges and other officers; negotiating and ratifying treaties; and (somewhat like the Senate in ancient Rome) providing extensive advice (which the President, being elected by the legislature, would be hard pressed to reject). The presidential conception, in contrast, would lodge most of these powers in the chief executive.

Randolph's draft goes as far as he could go in the direction of a senatorial presidency without actually ignoring altogether the resolutions voted by the Convention. He introduces new powers over treaties and ambassadors and consigns them exclusively to the Senate; he adds no important powers to the presidency (except the power to receive ambassadors). In Rutledge's handwriting are added a few points—chiefly the pardon power, and a clearer designation of the president as "Commander-in-Chief of the Land & Naval Forces." And there is one subtle matter. Rutledge's remarks first provided that the

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on single executive); *id.* at 119 (June 5) (opposing Wilson on appointment of judges by the executive); 2 CONVENTION RECORDS, *supra* note 2, at 57 (July 19) (opposing all modes of electing the executive except by the legislature).

105. 1 CONVENTION RECORDS, *supra* note 2, at 66 (June 1). Randolph's principal other remarks on the executive are at 2 CONVENTION RECORDS, *supra* note 2, at 43 (July 18) (favoring appointment of judges by the Senate), and at 54–55 (July 19) (supporting Luther Martin's motion to limit the executive to a single term).

106. 2 CONVENTION RECORDS, *supra* note 2, at 41 (July 18).

107. 2 CONVENTION RECORDS, *supra* note 2, at 57 (July 19) (favoring electoral college); *id.* at 81 (July 21) (favoring senatorial appointment of the judiciary).

president be elected by a *joint* ballot of the legislature, which would give the large states, with their greater representation in the lower house, an advantage; he then changed the provision so that each house would vote separately. What explains the change? It is impossible to be certain; but in this instance it is reasonable to conjecture that his insertions were made during a Committee meeting and that the change was in response to an objection raised (presumably by Ellsworth) on behalf of the small states.

We do not know; but the essential point is that Rutledge essentially leaves Randolph's senatorial scheme intact. We shall need to watch the sequence of drafts for alterations as they pass through Wilson's hands: he had a special interest in the presidency, and this is one of the areas in which his influence on the Committee appears to have been greatest.

c. The Judiciary

Madison's original Virginia Plan had said little about the national judiciary. It had provided for a supreme court and for inferior courts; for judicial tenure during good behavior; and for no reduction in salaries.<sup>108</sup> These elements made their way, slightly modified, into the Convention resolutions, and were copied more-or-less verbatim by Randolph into Document IV.<sup>109</sup>

The same is not true for the provisions concerning jurisdiction of the national courts. The Virginia Plan provided for jurisdiction over: piracies and felonies on the high seas; "captures from an enemy"; "cases in which foreigners or citizens of other States applying to such jurisdictions may be interested"; cases involving the collection of the national revenue; impeachments of national officers; and "questions which may involve the national peace and harmony."<sup>110</sup> The Convention resolutions had been even briefer: "Resolved[.] That the Jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony."<sup>111</sup>

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108. 1 CONVENTION RECORDS, *supra* note 2, at 20–23 (May 29).

109. 2 CONVENTION RECORDS, *supra* note 2, at 146–47; COMMITTEE DOCUMENTS, *supra* note 20, at 279.

110. 1 CONVENTION RECORDS, *supra* note 2, at 22 (May 29).

111. 2 CONVENTION RECORDS, *supra* note 2, at 132–33; COMMITTEE DOCUMENTS, *supra* note 20, at 245.

The Randolph Draft adds considerable detail. The bulk of the passage is in Randolph's hand. (The clauses in carats are marginal insertions in the hand of Rutledge, to which I shall return when discussing Draft IX. I omit the numerous check marks in Wilson's hand.)—

7. The jurisdiction of the supreme tribunal shall extend

1. to all cases, arising under laws, passed by the general;  
^Legislature: ^

2. to impeachments of officers: and

3. to ^such^ other cases, as the national legislature may assign, as involving the national peace and harmony, in the collection of the revenue, in disputes between citizens of different states, ^in disputes between a State & a Citizen or Citizens of another State^ in disputes between different states; and in disputes, in which subjects or citizens of other countries are concerned ^& in Cases of Admiralty Jurisdn^

But this supreme jurisdiction shall be appellate only, except in ^Cases of Impeachment & ~~in~~^ those instances, in which the legislature shall make it original. and the legislature. shall organize it.

8. The whole or a part of the jurisdiction aforesaid. according to the discretion of the legislature. may be assigned to the inferior tribunals, as original tribunals.<sup>112</sup>

Subsequent drafts added refinements; but here, for the first time, we have a recognizable delineation of the jurisdiction of the federal courts. In certain respects, this section is even more of an innovation than the enumeration of legislative powers, for most of those powers were already present in the Articles of Confederation. But this grant of jurisdiction is a clear expansion of the federal judicial power, going well beyond what Madison's *Notes* relate as having been discussed in Convention. The expansion is all the more remarkable when one recalls with what difficulty the delegates were persuaded to allow the creation of federal courts. I note that virtually the entire passage is in Randolph's handwriting.

One further point is worthwhile to mention. It has a bearing also on the enumeration of powers and the Necessary and

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112. 2 CONVENTION RECORDS, *supra* note 2, at 146–47; COMMITTEE DOCUMENTS, *supra* note 20, at 279. (I have corrected some errors of transcription in Farrand.)



Proper Clause (to which I shall come in due course). Madison's *Notes* for June 13 show Randolph (seconded by Madison) proposing the brief and highly general language specifying the jurisdiction of the national courts that eventually became the Convention resolution quoted above.<sup>113</sup> From the account in Madison (and from the Convention resolutions themselves) one might conclude that this was language intended to be incorporated into the final text of the Constitution. But the notes of Yates for that day give a fuller account of Randolph's (and the Convention's) reasoning:

Gov. Randolph observed the difficulty in establishing the powers of the judiciary—the object however at present is to establish this principle, to wit, the security of foreigners when treaties are in their favor, and to preserve the harmony of states and that of the citizens thereof. This being once established, it will be the business of a sub-committee to detail it; and therefore moved to obliterate such parts of the [original Virginia] resolve so as only to establish the principle, to wit, *that the jurisdiction of the national judiciary shall extend to all cases of national revenue, impeachment of national officers, and questions which involve the national peace and harmony.*<sup>114</sup>

In other words, Randolph's proposed language (which passed unanimously) was explicitly put forward as a place-holder, with the details to be filled in; and it was Randolph who did the filling in. This major segment of the Constitution appears to be his own handiwork.

#### d. Miscellaneous Provisions (and Bills of Rights)

The Randolph Draft also contains several other matters—filling in details on the admission of new states, guaranteeing to the states a republican form of government, specifying an amendment process. It outlines a process for ratification of the Constitution, and, for the first time, allowed for a less-than-unanimous ratification by the states, although it left blank the exact number. In the main, on these points, Document IV does what was expected, and merely fills in details, broadly in the

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113. 1 CONVENTION RECORDS, *supra* note 2, at 232.

114. *Id.* at 238. The Yates notes need to be handled with caution, since they were later doctored by "Citizen Genet"; *id.* at xiv–xv. But other documents point in the same direction, and I take this passage to be reliable as a report of Randolph's reasoning. As we shall see, this is not the only place where the language of the Convention resolutions may have been intended to serve as a place-holder.

spirit of the Convention resolutions and the Articles of Confederation. There is also a more surprising marginal insertion—this time in Rutledge’s hand, but then deleted—providing that state laws repugnant to the Constitution were to be treated as void, and were not to be followed by the national judiciary.<sup>115</sup> There are subtle matters here, regarding the way in which these various issues were handled in the successive drafts; but I shall leave them to one side. There is a much more significant issue to consider.

So far, I have been discussing the portions of Randolph’s draft that deal with what was then called “the frame of government.” But what about the other half of the duplex structure inherited from George Mason: a declaration of rights? Ordinarily, such a declaration would appear at the beginning of the document; and Randolph in fact begins Document IV with some important remarks about constitutions in general. He stresses the need for the Constitution to be flexible, and therefore to contain “essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events[.]”<sup>116</sup> This comment is followed by the admonition “To use simple and precise language,” and then by an important paragraph on the nature of a preamble.

“A preamble,” he says, “seems proper.”<sup>117</sup> But then he immediately issues a qualification. Preambles, he says, are

115. See 2 CONVENTION RECORDS, *supra* note 2, at 144; COMMITTEE DOCUMENTS, *supra* note 20, at 277. (“All laws of a particular state, repugnant hereto, shall be void: and in the decision therein, which shall be vested in the supreme judiciary, all incidents without which the general principles cannot be satisfied, shall be considered, as involved in the general principle.” Some slips in Farrand’s transcription have here been corrected.) This was evidently an attempt to formulate the Supremacy Clause required by the Convention resolutions. I note in passing the awkwardness of the formulation, which is characteristic of Rutledge—and which provides at least a minor indication that Wilson, a far better draftsman, was not involved in the Randolph draft.

116. 2 CONVENTION RECORDS, *supra* note 2, at 137; COMMITTEE DOCUMENTS, *supra* note 20, at 265. It would be rash to attempt to claim Randolph on the basis of these remarks as an advocate of a “living Constitution.” In the first place, his remarks explicitly recognize the existence of “permanent and unalterable” principles. But, more importantly, the philosophical framework of the modern debate over originalism simply did not exist in the 18th century, and to try to squeeze Randolph into the modern conceptual categories is to risk severe anachronism.

117. *Id.* Farrand has mis-transcribed this passage. It reads (all deletions and interlineations are in Randolph’s hand):

A preamble seems proper. Not for the purpose of designating the ends of government and human polities—This business, if not fitter for the schools, is at least sufficiently executed display of theory, howsoever proper in the first

proper in the constitutions of the states for two purposes: first, for designating the ends of government and human polities; second, for presenting “the natural rights of man not yet gathered into society.” But in the present Constitution such a “display of theory” is unnecessary (“fitter for the schools” he says in a cancelled passage). The matter has been “sufficiently executed” in the state constitutions. We are now dealing with men who have already entered into society, and whose rights are “interwoven with . . . the rights of states.”<sup>118</sup>

It is customary to speak of the opening words of the U.S. Constitution as the “preamble.” But that is our language, not the language of the document itself. In any case, Randolph’s rejection of preambles is itself longer than the “preamble” we now have. It is important to understand that he is employing the term in a broader and an older sense, in the manner of some of the state constitutions—to designate (as he says) a statement of the rights of man, and the fundamental ends of government. These matters are more commonly referred to, in Mason’s language, as a declaration or bill of rights.

Why does Randolph wish to avoid commencing the Constitution with a bill of rights? The answer, as with so much else in this draft, is likely connected to slavery and also to George Mason. In 1776, when Mason wrote the Virginia Declaration, Edmund Randolph was a member of the drafting committee. He seems to have played no active role. He was at the time 22 years old; Mason was 50. But Randolph observed Mason’s handiwork closely, and it left a lasting impression. In his *History of Virginia*, written more than thirty years later, Randolph recalled the significance of Mason’s work and also the duplex structure of the Virginia Constitution:

In the formation of this bill of rights two objects were contemplated: one, that the legislature should not in their acts violate any of those canons [specified in the bill]; the other, that in all the revolutions of time, of human opinion, and of government, a perpetual standard should be erected, around which the people might rally and by a notorious record be forever admonished to be watchful, firm, and virtuous.

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formation of state governments, ~~seems~~ <sup>is</sup> unfit here; since we are not working on the natural rights <sup>of men</sup> not yet gathered into society, but upon those rights, modified by society, and ~~supporting~~ <sup>interwoven with</sup> what we call ~~states~~ the rights of states.

For a reproduction of the original, see COMMITTEE DOCUMENTS, *supra* note 20, at 264.

118. I am reading the cancelled “sufficiently executed” as having originally been intended to refer to the “state governments” later in the sentence.

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The cornerstone being thus laid, a constitution delegating portions of power to different organs under certain modifications was of course to be raised upon it.<sup>119</sup>

Randolph in 1787 no doubt painfully recalled what had happened to Mason's bill of rights during the Virginia debate of 1776. Mason's draft had declared

That all Men are born equally free and independant [*sic*], and have certain inherent natural Rights, of which they cannot by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing [*sic*] and obtaining Happiness and Safety.<sup>120</sup>

The Virginia Convention balked at this language, on the grounds that it was not compatible with a slaveholding society.<sup>121</sup> They changed "are born equally free" to "are by nature equally free," and "inherent natural rights" to "inherent rights."<sup>122</sup> The issue, in the midst of a revolution, consumed five days of debate, until Edmund Pendleton proposed the insertion of the phrase in brackets:

That all men are by nature equally free and independent, and have certain inherent rights, of which, <when they enter into a state of society,> they cannot, by any compact, deprive or divest their posterity; . . .<sup>123</sup>

Randolph now dismisses all such formulations about rights and nature and society as "fitter for the schools" than for a Constitution. No doubt he wished to avoid a repetition of the debates that had convulsed the Virginia Convention, and no doubt he wished to keep at bay the intractable issue of slavery. This is the likeliest explanation for his opposition to opening the Constitution with a bill of rights.<sup>124</sup>

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119. RANDOLPH, *supra* note 61.

120. 1 MASON PAPERS, *supra* note 62, at 277.

121. For a full discussion, see the excellent headnote to Mason's draft, *id.* at 289–91. See also BROADWATER, *supra* note 62, at 84. Randolph himself explicitly noted the connection to slavery in his History of Virginia. RANDOLPH, *supra* note 61, at 253.

122. 1 MASON PAPERS, *supra* note 62, at 289.

123. *Id.* at 287. See also BROADWATER, *supra* note 62, at 84.

124. I note in passing—an important point, apparently first pointed out by Akhil Amar—that the use of the expression "Bill of Rights" to designate the first ten amendments to the Constitution is in fact a twentieth-century coinage. The intellectual history here is complex. For an overview, see MAIER, *supra* note 59, at 459–68.

It should also be observed that, at the time of the Convention, the New England states and Pennsylvania had all begun the process that would eventually lead to abolition; Vermont and Massachusetts did so in reliance on their respective bills of rights. This fact, and the fact that he was serving on a Committee with three delegates from states that had

Randolph goes on to say that, in his view, a preamble ought “briefly to ~~represent~~ declare, that the present federal government is insufficient to the general happiness; that the conviction of this fact gave birth to this convention; and that the only effectual ~~means~~ode which they ~~could~~an devise, for curing this insufficiency, is the establishment of a supreme legislative executive and judiciary.”<sup>125</sup>

The issue raised by this remark was evidently a point of particular sensitivity for Randolph. By proposing the Virginia Plan, he had arguably acted *ultra vires*, exceeding the Convention’s mandate to amend the Articles of Confederation: the charge was frequently made, then and since. Document IV contains, on the last of its five sheets, a discursive passage in which he returns to the point. He suggests that an attempt be made to explain to the people the purpose of the document—to set forth the defects of the Confederation, to show that a reform of the existing system cannot solve the problems, and to present the Constitution as the best remedy. He was clearly looking to a national audience: “[W]e ought,” he says, “to furnish the advocates ^of the plan^ in the country with some general topics.”<sup>126</sup> Farrand prints this detached sheet as the conclusion to the Randolph Draft. Perhaps it was intended as a conclusion; but, in view of Randolph’s earlier remarks, it seems equally likely that it was intended either as an elaboration of his remarks on a preamble, or perhaps as an early sketch for an address of the sort that eventually accompanied the Constitution to Congress, explaining the actions of the Convention.<sup>127</sup> These

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already begun the process of abolition, may provide a further explanation for Randolph’s skittishness about including a bill of rights. I owe the observation to John Mikhail.

125. COMMITTEE DOCUMENTS, *supra* note 20, at 265.

126. 2 CONVENTION RECORDS, *supra* note 2, at 150; COMMITTEE DOCUMENTS, *supra* note 20, at 285.

127. Randolph had contemplated the possibility of “an address to accompany the new constitution” as early as his letter to Madison of March 27, 1787. 9 MADISON PAPERS, *supra* note 56, at 335. (I owe the point to Mary Bilder.) The first four sheets of Randolph’s draft are written on both sides, giving eight pages. Most, though not all, contain annotations by Rutledge. None is numbered by Randolph; somebody (presumably an archivist at the Library of Congress) has penciled in page numbers. The fifth sheet is somewhat tidier, contains no remarks by Rutledge, and is written on a single side. It is on similar paper to the other sheets; all five sheets were found together in the papers of George Mason. But internally there is nothing to link Randolph’s fifth sheet conclusively to the others. It begins, “The object of an address is to satisfy the people of the propriety of the proposed reform.” By “address” here Randolph plainly does not mean a speech, but a formal, written address of the sort that was discussed in Convention on September 10, 12, and 15. See 2 CONVENTION RECORDS, *supra* note 2, at 564, 582, 621–23. Such an address was sent to Congress, over Washington’s signature, on September 17, and in fact makes many of the same points as Randolph’s fifth page. *Id.* at

points are not resolvable; but it is clear that the issue of ratification already weighed on Randolph as he prepared his draft.

### 5. Authorship of the Draft

What are we to make of this draft as a whole? It is a complicated document and contains many important innovations. So that raises the question: Who wrote it? Because Farrand prints it as Document IV of the Committee of Detail, and because it contains markings in the handwriting of John Rutledge, it is usually treated as a product of the Committee's deliberations. For instance, Clinton Rossiter says that the Committee first met and "rummage[d]" to gather materials that might be useful to their purposes.<sup>128</sup> (This is wrong: the Convention itself furnished the Committee with copies of the Convention resolutions and with copies of the Pinckney and New Jersey plans). Then, "while the others looked over his shoulder, Randolph wrote out the rough draft of a constitution."<sup>129</sup> This is an invention. William Meigs, in contrast, who first studied Document IV, treats it instead as the work of Randolph.<sup>130</sup> The point is debatable, but I believe that, on the balance of the evidence, Meigs's view is correct.

To see why, let us begin by considering the portion of the draft that is in Randolph's handwriting and then turn to the Rutledge additions. In the first place, Randolph's introductory reflections on preambles; his admonition to use simple language; his recommendations at the end about the strategy of ratification; his use of "I" in the very last sentence—these things hardly seem compatible with a report of a document drafted by a

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666–67. However, because by September Randolph had decided not to sign the Constitution, his sheet cannot date from that episode, but from earlier in the proceedings—most likely from the time of the Committee of Detail, though the fact is not absolutely certain. That leaves open the question of the precise sequencing of the fifth sheet. Since Randolph, on his first page, states that the *conclusion* to the Constitution should contain a solemn pledge of the parties to observe the new document, and since his fifth sheet is a direct elaboration of his remarks on *preambles*, it probably belongs more properly to the beginning of the document than to its end—though it may be that he was undecided whether the better vehicle for communicating his points was a preamble or a separate address to the people.

128. ROSSITER, *supra* note 32, at 201.

129. *Id.* at 201–02 ("After the Randolph draft had been discussed point by point, and the chairman had introduced various modifications in his own hand, the fourth and most decisive stage was taken over by the most learned, experienced, and dedicated member of the committee, James Wilson.").

130. MEIGS, *supra* note 21, at 324.

committee. Secondly, in terms of the constitutional content of the draft, almost all the important innovations correspond to Randolph's own firm beliefs, as expressed in the Convention—the distrust of a strong executive, the conception of a powerful senate, the strong desire for an enumeration of legislative powers. Randolph was a sophisticated lawyer and certainly capable of drafting by himself the passages on the jurisdiction of the federal courts. The exact nuances of his views on slavery are hard to pin down; but at the least he believed that the “deep South” provisions were necessary to placate South Carolina. There is moreover no direct evidence that any other committee member contributed any of these innovations.

Procedurally, too, Randolph's authorship would make sense. The Committee's formal assignment was to revise the original Randolph proposals of May 29. What could have been more appropriate than to ask the distinguished Governor of Virginia to begin the process? And there is another small clue. At the beginning of his draft, at the end of his discussion of preambles, after a passage discussing the need to explain the decision to abandon the Articles of Confederation, he wrote (and then deleted) “In this manner we may discharge the first resolution.” But the first of the Convention resolutions deals with the tripartite structure of the national government; it says nothing about amending the Articles. Randolph is instead referring back to the first resolution of his own Virginia Plan.<sup>131</sup> Later in the manuscript, however, he takes passages from the Convention resolutions almost verbatim. This suggests that, at the time he began to write his draft, the Convention resolutions had not yet been prepared for the use of the Committee. And indeed, if we look closely, we see that, as soon as the Committee was appointed, Randolph, up to that point a regular participant in the Convention debates, delivers no speeches; and after one critical vote, Madison noted that the Virginia delegation split 2-2 because “Mr. Randolph happened to be out of the House.”<sup>132</sup> This is suggestive. Remember that Mason in 1776 had gone to work on his own and had essentially drafted both the Virginia Declaration of Rights and the Virginia Constitution from his room in the Raleigh Tavern. Randolph, as we saw, was

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131. “Resolved that the articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely “common defence, security of liberty and general welfare.” 1 CONVENTION RECORDS, *supra* note 2, at 20 (May 29).

132. 2 CONVENTION RECORDS, *supra* note 2, at 121 (July 26).

thoroughly familiar with this precedent. On balance, therefore (and certainty is not to be had) I am inclined to believe that, as soon as the Committee was appointed on Tuesday, July 24, Randolph either decided to emulate Mason's example or was asked (as the sponsor of the Randolph plan) to prepare a first draft; in either case, he absented himself from the Convention in the days before the Committee first met. On July 25 the Convention voted to supply the Committee with a copy of the Convention resolutions. This would explain the discrepancies in his opening paragraphs.

The Rutledge marginalia present a somewhat harder problem. His handwriting appears on the Randolph draft and on the last of the Wilson drafts; this is compatible with his having presided over Committee meetings in which the drafts were discussed. There are also small indications (like the shift from joint to separate balloting for the presidency) that may point to a committee discussion. On the other hand, most of the changes Rutledge makes to the Randolph draft are in keeping with his own views and his heaviest interventions are in the slavery and navigation provisions, where the interests of South Carolina were deeply involved. The possibility cannot be excluded that he and Randolph jointly worked out the slavery provisions before the Committee first met; certainly both delegates would have been acutely aware of General Pinckney's threats (which had been expressed on Monday). The evidence, however, is inconclusive. The remaining annotations on this document are the numerous check-marks. These are in the hand of Wilson and were most likely made in the course of preparing the subsequent drafts.

#### 6. Conclusions on Document IV

I have dwelled on Randolph's draft both for its intrinsic importance and because it illustrates something significant about the historiography of the Convention. It is difficult to find accounts that grant his draft more than a sentence or two. But it should now be clear that this is a document of the utmost importance. It introduces many striking innovations—the enumeration of powers, the protection of the slave trade, the rules on exports and navigation acts, the granting of appointment powers to the Senate, the specification of the jurisdiction of the federal courts. Moreover, none of the most widespread theories about the Committee of Detail is able to survive even a casual encounter with Randolph's document. The view that the Committee was a



mere intermission is plainly untenable. The view that the Committee was “a committee of Wilson and four others” is equally untenable. Of the major innovations I have just listed, Wilson would have opposed all but the last. At this stage there is no clear sign of his participation, even on minor matters. And as for the theory that Rutledge rather than Wilson dominated (or even “hijacked”) the sessions, it is of course true that the Committee acted to protect the interests of the deep South; and it must be the case that Rutledge was deeply involved.<sup>133</sup> But the first appearance of the objectionable provisions is in Randolph’s hand, not Rutledge’s.

It is undeniable that Randolph was something of a “chameleon,” that he was cantankerous, and that in the end he refused to sign the Constitution. Perhaps for these reasons most historians place him far down in the rankings of delegates. In his most visible role at the Convention, when he opened the proceedings by presenting the Virginia Plan, he is generally viewed as merely Madison’s mouthpiece. But if the analysis given here is correct (and complete certainty is not possible) then Randolph produced Document IV largely on his own; and this makes him the primary author of the jurisdictional provisions of Article III. He more broadly has the honor, not only of having presented the Virginia Plan, but also of having written the first draft of the Constitution. But it is a very mixed honor. His positive contributions, though of fundamental

133. A similar point holds for Hueston’s thesis of a hijacking by states’ rights proponents. Hueston, *supra* note 36, deserves full credit for seeing the importance of the Committee of Detail and for trying to disentangle its contributions to federal-state relations. But his execution of this important insight, in my view, has some serious limitations. (i) He does not attempt to analyze the individual drafts, or to consider them in sequence: and thus he misses much of the story of the internal dynamics of the Committee. (Any discussion of these textual matters must start with the scholarly work of Jameson and McLaughlin, which he does not mention.) (ii) He lumps together all five committee members as “states’ rights” advocates: this is simply incorrect, especially for Wilson, but the matter also requires a more nuanced statement for the others. More broadly, he does not attempt to tack back-and-forth between the Committee and the statements of its members in Convention in order to try to work out the individual contributions; as a result, he misses the subtle and important differences between them. The fact that most of the drafts are in Wilson’s handwriting is mentioned in passing, but its importance not appreciated; Randolph’s draft and the Pinckney Plan are not explicitly analyzed; he misses the contributions of Randolph to the drafting of what would become Article III. (iii) He overstates his conclusions; in particular, it is not clear that “a strong[] national model”—in particular, one without enumerated powers—was “the first choice of the Convention as a whole.” *Id.* at 782. On the contrary, even the two strongest nationalists at the Convention, Madison and Wilson, appear to have seen some such enumeration as inevitable; and many others raised vehement objections to an unconstrained grant of legislative power to the national government. *See infra*, notes 184–201 and accompanying text.

importance, are overshadowed by the provisions on slavery. Moreover, he had the opportunity to follow the precedent of the state constitutions, and to begin the national Constitution with a “preamble,” i.e. a Bill of Rights. That would have been no radical step; and, as Mason subsequently pointed out to the Convention, the job could have been accomplished “in a few hours.”<sup>134</sup> But Randolph consciously chose a different course: a decision that nearly derailed the ratification of the Constitution. Ironically, he and Mason both refused to sign the final document: and Mason’s refusal was in large measure based on the absence of a Bill of Rights. It is these facts that give the unexplained presence of Randolph’s draft among Mason’s papers a certain poignancy.

#### D. DOCUMENT V

We now come to the Wilson drafts, which make up the rest of the surviving documents from the Committee of Detail. (Of all the Committee documents, only the Randolph draft is not in Wilson’s handwriting.) The next document is numbered by Farrand as “Document V.” This is misleading. It is in fact written on two different sheets of paper, which are located in distinct parts of the Wilson archive: Farrand has spliced them together to create a single document.<sup>135</sup>

Wilson’s normal practice in preparing the Committee drafts was to begin with a large folio sheet, which he folded in half across its width. This gave him a signature of four pages; frequently he would write only on the right half of the page, allowing ample room for subsequent additions. His two full drafts of the Constitution consist each of several such signatures. In this instance, he began writing on the outside front page of the signature, leaving the left-hand side of the page blank. There are numerous insertions and re-writings. The page (cleaned up, with some deletions and false starts omitted) began as follows:

The People of the States of New Hampshire &C, ^already  
confederated united and known by the Stile of the “United

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134. See *supra* note 79, at 587–88 (Sept. 12) (quoting Mason on the utility and ease of adding a Bill of Rights).

135. For details, see COMMITTEE DOCUMENTS, *supra* note 20, at 287, and the *Addendum*, *id.* at 367. Farrand, as he worked his way through the Wilson manuscripts, doubtless saw that the second sheet fit naturally with the first, and printed the two together. There is no reason to question his attribution, but it would have been preferable if he had somewhere noted that the two sheets of paper are in fact distinct both in their appearance and their physical location.

States of America”<sup>136</sup> do ~~agree upon~~ ordain ^declare^ and establish the following Frame of Gov.<sup>1</sup> as the Constitution of the said United States.

He then inserted a “We” before “The People.” This is the first occurrence of what were to become the famous opening words of the Constitution.

There follow two brief paragraphs dealing with the national legislature, whose two chambers he designates (probably following the terminology of the Pinckney Plan) as the “House of Representatives” and the “Senate.” In the wide margin he experiments with the wording. This folio sheet breaks off halfway down the page. On both sides of a separate, smaller sheet of paper (headed “The Continuation of the Scheme”) he lists the topics remaining to be treated. The ordering is the usual one: legislature—executive—judiciary—miscellaneous. The sheet is a mere laundry list; no details are given.

The two sheets are only a sketch, and have the look of something prepared by Wilson for his own purposes, possibly in the days before the Committee first met. There is no sign of contributions from other members of the Committee and there is also no sign that he had seen the Randolph draft. The first sheet contains a property requirement for the House of Representatives (of 50 acres of land). Whether this was to be a restriction on the voters or on the candidates is not clear. The provision is difficult to reconcile with Wilson’s general position against limitations on the franchise; but Wilson here would have been constrained by the explicit instructions of the Convention.<sup>137</sup>

From today’s perspective, the most interesting part of the document is the opening words. Wilson explicitly grounds the Constitution in the *people* of the states, rather than in the states themselves. The idea of popular sovereignty was central to Wilson—more central, perhaps, to Wilson than to any other delegate and certainly more than to any other member of the Committee of Detail.<sup>138</sup> There is a subtle ambiguity in his formula, “We the People of the States of New Hampshire &c.” Is this People a single collectivity (i.e. the totality of inhabitants of these thirteen states)? Or is it instead thirteen separate

136. COMMITTEE DOCUMENTS, *supra* note 20, at 289. The transcription of these heavily re-written sentences in Farrand is opaque.

137. See *supra* text accompanying notes 79–81.

138. See Ewald, *supra* note 42, *passim*.

collectivities? There is no question about Wilson's own view, and the formulation "We the People of the United States" would have been closer to his actual position. But at this stage of the proceedings it would have been pressing matters to omit the states altogether. And perhaps he already foresaw that, unless ratification by the states was to be unanimous, his formula would need to be changed.

#### E. DRAFT VI/VIII

##### 1. General Remarks

The documents Farrand labels VI, VII, and VIII need to be treated as a unit. Draft VI/VIII (as I shall designate it) is a proper draft of a Constitution—the second after Randolph's, and the first clearly produced by the Committee. It is in Wilson's hand and incorporates elements both from the Randolph draft and from the earlier Wilson sketch. Unfortunately it is not complete. It originally consisted of three folio sheets, each folded into a four-page signature. But the middle signature has disappeared.

We are thus left with three pieces. Document VI is the first signature. It consists of four pages and deals principally with the composition and election of the House of Representatives and Senate. Document VIII is the third signature; it deals primarily with the "miscellaneous" category of topics—ratification, amendments, and the like. It has one curious feature. The first sheet of Wilson's Document V filled only the front half-page of a four-page signature. The thrifty Wilson flipped the signature over to begin writing Document VIII. This has the consequence that the first version of "We the People" in Document V appears upside-down on the last page of Document VIII.

The missing middle signature would have contained, on four pages, the enumeration of congressional powers, as well as the treatment of the presidency and the judicial branch. In the Wilson archive, placed between the first and the third signatures, was a further document, also written in Wilson's hand. This document (Document VII) Jameson identified as a set of extracts from the New Jersey Plan, followed by a set of extracts from the Pinckney Plan. The two sets of excerpts are written onto a single four-page folio signature; the passages deal with the powers of Congress, and with the executive and judicial branches, i.e. precisely the topics that would have been treated in the missing signature. It is highly unlikely that any of Wilson's

descendants would have known enough about the workings of the Committee of Detail to have expertly placed this sheet precisely where Jameson found it, between the two surviving sheets of the Committee draft. This suggests that the placement was made by Wilson himself, and perhaps that the missing middle sheet had already disappeared during his lifetime: but there is no way to be sure.

Draft VI/VIII adopted Wilson's opening words, originally in the form, "We the People and the States of New Hampshire &C." But Wilson altered that formulation back to his original (and far more Wilsonian) "We the People of the States." The draft also provides that the new government is to be called the "United People and States of America"—also a Wilsonian formula, but this time with echoes of the Roman republic.<sup>139</sup>

A few general remarks about VI/VIII are in order. The entire draft is in Wilson's hand. There are in particular no annotations by Rutledge. Only on the somewhat messy last page of the first signature do we find a number of items checked off (again, in Wilson's hand). It is often said that Rutledge served as the Committee's chairman, but the evidence is not conclusive. It is true that his name appears first in Madison's list of the members of the Committee and also true that he presented the final report to the Convention. But it is not clear from these facts that the Convention designated him chairman, or even that such a small Committee had a formal presiding officer. His handwritten interventions occur only on two documents (the Randolph draft and the final draft) and these facts are capable of any number of explanations. The check marks in particular are compatible with Wilson's having presided over Committee discussions, though it is more likely that he made them as he compared one draft with another. In any case, Wilson made numerous interventions and alterations to this draft. Inspection shows that virtually all of them are stylistic—interventions to adjust the wording, or to render a provision more clearly, but none that changes anything of substance. Although it is possible

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139. 2 CONVENTION RECORDS, *supra* note 2, at 152. Wilson, like many of the delegates, was thoroughly steeped in the history of Rome, and this phrase was clearly intended to evoke the ancient formula, *Senatus populusque romanus*—"the Senate and People of Rome"—abbreviated on coins and public buildings as "SPQR." Notice that, in a Wilsonian twist, Draft VI/VIII inverts the order, and places the People first. This formula was however dropped in Draft IX in favor of the "United States of America." *Id.* at 163.

that these editorial changes were made in Committee, it seems likelier that they were made by Wilson in private.

The first and last signatures adopt the substance (and often the language) of the Randolph draft, with the additions that were made in Rutledge's hand. They add several new provisions that go beyond anything authorized in the Convention resolutions, and (as we shall see) with which Wilson clearly disagreed. For this reason, the draft can confidently be regarded as the work of the Committee and not of Wilson alone. But this raises the question of when the draft was produced. The most reasonable conjecture is that the Committee met to discuss the Randolph draft; that certain changes were voted upon; that Wilson was then designated to write the next draft; and that VI/VIII is the result.

Most of the work of this draft consists in a tightening of the language, sharpening the formulations of ideas that were already present in earlier versions. So we get carefully worded clauses guaranteeing to the states a republican form of government and specifying procedures for the ratification and subsequent amendment of the Constitution.<sup>140</sup> The Committee added from the Articles of Confederation a cumbersome procedure for resolving disputes over territorial boundaries between states, and, out of logical sequence at the very end of document VIII, inserted a stipulation of the veto power of the President (who is here referred to as the "Governor").<sup>141</sup> These last two provisions would have been of special interest to Wilson; but the evidence does not exist to say whether they were added at his specific instigation.<sup>142</sup>

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140. *Id.* at 159–60; COMMITTEE DOCUMENTS, *supra* note 20, at 313–14. The Convention resolutions had stipulated that ratification was to be by state conventions selected for the purpose, but had left open the question of whether ratification need be unanimous. The Randolph draft provided for a less-than-unanimous ratification, but left the exact number blank, as does the first Wilson draft. Similarly, the Convention resolutions had specified only that "Provision ought to be made for the Amendment of the Articles of Union, whensoever it shall seem necessary." 2 CONVENTION RECORDS, *supra* note 2, at 133. The Randolph draft (in Rutledge's handwriting) provided for amendment by a new Convention, to be called by Congress on the application of two-thirds of the state legislatures.

141. 2 CONVENTION RECORDS, *supra* note 2, at 132; COMMITTEE DOCUMENTS, *supra* note 20, at 317.

142. His views on the absolute presidential veto were repeatedly expressed during the Convention. *See, e.g.*, 1 CONVENTION RECORDS, *supra* note 2, at 100; 2 CONVENTION RECORDS, *supra* note 2, at 300. As for the provision concerning territorial boundaries and disputes between states, Wilson, unlike the other Committee members, had extensive experience in litigating such territorial disputes under the arrangements of the Articles; though that fact could just as well have made him hostile to the existing

## 2. Controversial New Provisions

None of these various provisions was especially controversial, and Wilson likely assented to them all. But Draft VI/VIII also added three novel provisions which had not been approved by the Convention, and which Wilson would certainly have resisted. First, it provided that the States were to specify the qualifications of the electors of the lower house, and the time, place, and manner of holding elections, subject to regulation by Congress.<sup>143</sup> Secondly, it granted to Congress the power to introduce whatever property qualifications for members of either chamber of the national legislature it found expedient.<sup>144</sup> It retained the Randolph draft's assignment to the Senate of the power to make treaties (as well as the power to appoint Justices of the Supreme Court).<sup>145</sup> Finally, it provided that the salaries of members of both houses of Congress were to be set and paid by the state legislatures.<sup>146</sup> Wilson might reluctantly have accepted the first of these provisions because of its inclusion of a congressional override, and the second as reflecting the express instructions of the Convention; but the other two run contrary to his core principles.

The final provision is especially significant for the light it sheds on the internal workings of the Committee. The Convention had in fact earlier voted, on June 12, by a vote of 8-3, that the wages of members of the lower house should be paid out of the national treasury.<sup>147</sup> In that discussion, Connecticut and South Carolina both voted for payment by the state legislatures. On June 26, this time by a margin of 6-5, the Convention voted that the upper house as well be paid out of the national treasury. Again, Connecticut and South Carolina voted

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arrangements. I note in passing that the Committee assigned the power to adjudicate such disputes to the Senate, rather than to the legislature as a whole. It is an interesting though irresolvable question whether Wilson would have approved this assignment. The matter can be argued either way.

143. *Id.* at 153. The Committee in this draft also hesitated between whether the qualifications for electors of the national legislature should be the same as for the largest house of the state legislature, or whether the states should be allowed to set the requirements, subject to a congressional override. *Id.* at 163-64.

144. *Id.* at 155-56.

145. *Id.* at 155. Randolph had given the Senate the power to appoint the full federal judiciary; Wilson's version (which is written into the margin of his draft) thus represents a return to the position of the Convention resolutions, which had given the Senate the power to appoint the Supreme Court only.

146. *Id.* at 156. Oddly, Rutledge's Draft IV had originally provided that the wages of Senators should be paid out of the national treasury; but he crossed out this provision in the draft. *Id.* at 142.

147. 1 CONVENTION RECORDS, *supra* note 2, at 215-16.

on the losing side; and, in this second vote, Oliver Ellsworth both introduced and spoke for the losing resolution. Wilson vigorously opposed the motion on the grounds that the Senators would then be entirely the creatures of the state legislatures.<sup>148</sup> In the light of this earlier history, it is hard to resist the conclusion that Rutledge and Ellsworth seized the opportunity to try to reverse their earlier defeats. They must have obtained the support of Randolph or Gorham, since this provision survived into the final draft presented by the Committee to the Convention.<sup>149</sup>

### 3. Slavery, State Power, and Wilson's Predicament

Let us now briefly take stock. Draft VI/VIII is the first draft of the Constitution that can confidently be attributed to the Committee. The Committee, as instructed, had cleaned up the Convention resolutions, and filled in many details in broad accordance with its instructions. But it had also added a number of provisions of its own, several of which went far beyond or even contradicted the earlier votes of the Convention. There is a common pattern to these innovations that we must now consider.

The Randolph Draft had sought to limit the reach of the national government by adding an explicit enumeration of congressional powers. Within the national government itself, Randolph (who deeply feared a "monarchical" single executive) assigned several important executive powers, and in particular powers involving foreign affairs, not to the President, but to the Senate. His draft had also sought to safeguard the interests of the southern states by adding provisions concerning taxation of exports, navigation acts, and the slave trade. And now, in VI/VIII, the influence of the states over the national legislature has been augmented by several provisions, especially the one allowing each state to set the salaries of its representatives. Taken together, these innovations represent a large shift of power away from the national government and towards the states. Wilson might have acquiesced in some of these changes,

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148. *Id.* at 428–29, 433–34. As Wilson put the point: "In the present case, the states may say, although I appoint you for six years, yet if you are against the state, your table will be unprovided. Is this the way you are to erect an independent government?" *Id.* at 434. (This quotation occurs in the untrustworthy notes by Yates; but here there is no reason to suspect any inaccuracy.) These two votes did not make their way into the Convention resolutions; presumably this was an error of transcription.

149. 2 CONVENTION RECORDS, *supra* note 2, at 180 (Aug. 6).



but the totality must have filled him with foreboding. So we must face the questions: How were these changes introduced? Which of the committee members supplied the necessary third vote? What was Wilson's situation, and how did he react?

One very general warning is now in order. As we proceed, it is vital to bear in mind the limitations on our knowledge that I mentioned at the outset. There is much we do not know; and theories that depict the Committee of Detail as engaged in an attempt to "hijack" the Constitution are on shaky ground. Rutledge and Randolph have manifest character flaws. But they were not fools. No doubt, in drafting the Constitution, they nudged matters in the direction that they thought best. But is it likely that they thought they could engage in a wholesale re-writing? That they believed nobody would notice? Or could it be that it is we who are missing some piece of information? The hijack theorists tacitly assume that we have full knowledge of what was expected of the Committee. But that is plainly not correct.

Consider, for example, the account of the appointment of the Committee as it appears in Madison's *Notes*.<sup>150</sup> He tells us, first, that Elbridge Gerry moved the creation of a Committee to draft a Constitution, conformable to the Convention resolutions, but not to treat the executive. Then General Pinckney issues his threat on the slave trade and navigation acts. Then the Convention rejected a Committee of ten members, then of seven, before finally settling on five. Gerry's reservation about the executive is never again mentioned: the *Notes* do not tell us what happened to it. One imagines that somebody must have said *something* in response to General Pinckney: again, the *Notes* are silent. Real discussions do not happen like that. Did there occur a brief discussion after General Pinckney's remarks? Was it suggested that the Committee come up with a proposal on slavery, subject of course to later scrutiny? We do not know. But the idea that Rutledge believed he could somehow use the Committee to stage a kind of *coup d'état* is even more improbable, and I see no evidence that the Committee was engaged in any such enterprise.

In the absence of detailed documentation, a great deal must be conjectured; but certain facts can be stated with confidence. In the first place, the provisions concerning slavery and navigation acts must have originated from the two Southerners

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150. *Id.* at 95–96 (July 23).

on the Committee, Randolph and Rutledge. That much is clear; but there remain a number of puzzles. Randolph himself later in the Convention spoke passionately about the need for a supermajority for acts regulating commerce<sup>151</sup> and also about the need to restrict the powers of the central government (which he viewed as a threat to the independence of the States).<sup>152</sup> But, as we saw, during the August 22 debate he spoke *against* the provision safeguarding the slave trade that had emerged from the Committee of Detail.<sup>153</sup> That clause read (in relevant part): “No tax or duty shall be laid by the Legislature . . . on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited.”<sup>154</sup> Randolph declared, in opposition to a clause whose substance he had himself drafted,

He could never agree to the clause as it stands. He wd. sooner risk the constitution— . . . By agreeing to the clause, it would revolt the Quakers, the Methodists, and many others in the States having no slaves. On the other hand, two States might be lost to the Union.<sup>155</sup>

As I have sought to emphasize, Edmund Randolph is hardly the Convention’s most consistent delegate. In taking this position, he aligned himself with the position taken by most of the Virginia delegates, and against the more radical delegates from the deep South—including, notably, John Rutledge, who spoke in favor.<sup>156</sup> These observations suggest that, whatever may be true for export taxes and navigation acts, the primary mover within the Committee on slavery was Rutledge.

That observation raises a further question. Only Rutledge and Randolph came from states where slavery was a significant

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151. 2 CONVENTION RECORDS, *supra* note 2, at 452–53 (Aug. 29).

152. *Id.* at 631 (Sept 15); *cf. id.* at 17–18 (July 16).

153. *Id.* at 374.

154. The clause is § VI. 4 of the Committee Report. 2 CONVENTION RECORDS, *id.* at 183 (Aug. 6).

155. *Id.* at 374. These remarks have sometimes been construed as a denunciation of slavery, but are more plausibly viewed as a call for a compromise between the positions of South Carolina and “the Quakers.” I note in passing that Mary Bilder has shown that Madison’s *Notes* for late August were written up after the Convention had ended: there is especial reason for treating them with caution.

156. Rutledge expressed his view to the Convention on August 22:

If the Convention thinks that N.C; S.C.& Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States will never be such fools as to give up so important an interest.

*Id.* at 373.

economic interest. So how did the “deep South” provisions secure a majority of votes on the five-member Committee?

At this point it is necessary to clear away two widespread legends about Rutledge. One is the legend of a secret dinner meeting between Rutledge and Roger Sherman on June 30 at which they are said to have worked out the terms of an alliance between Connecticut and South Carolina.<sup>157</sup> The second is the claim that Rutledge was a close friend of Wilson’s, and indeed that Rutledge lodged in Wilson’s house in the opening weeks of the Convention.<sup>158</sup> Both claims have been frequently asserted in the scholarly literature. The second in particular has been used to support the thesis that Wilson and Rutledge worked together to “hijack” the Constitution. Both claims have their origin in what can only be termed a colorful 1942 biography of Rutledge.<sup>159</sup> The author of the only other biography, published in 1997, makes the unusual observation—unusual, at any rate, for an opening paragraph—that he found the earlier book so unreliable that he decided to ignore it altogether.<sup>160</sup> I have been able to find no documentary support for either legend and suspect them to be fabrications.

The story about the “secret dinner” does, however, contain a kernel of truth. There was certainly by the end of the Convention an alliance between the states of the deep South and the states of New England: and Connecticut and South Carolina were in the thick of it. By late August, when the delegates from Connecticut were vigorously defending the South Carolina position on slavery, it was clear to everybody at the Convention that a back-room bargain had been struck.<sup>161</sup> The issue arose into public view on August 21. Of particular interest are a set of

157. The longest discussion of the June 30 meeting and its significance is in FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 1776–1790*, at 176–78 (1965).

158. Wilson’s chief biographer, Charles Page Smith, repeats this claim. CHARLES PAGE SMITH, *JAMES WILSON: FOUNDING FATHER, 1742–1798*, at 203 (1956) (characterizing Rutledge as an “intimate friend” of Wilson’s). STEWART, *supra* note 45, at 165 and BEEMAN, *supra* note 5, at 269 n. 22, both follow his account. So, too, unfortunately, does Ewald, *supra* note 42, at 984.

159. RICHARD BARRY, *MR. RUTLEDGE OF SOUTH CAROLINA* (1942).

160. JAMES HAW, *JOHN AND EDWARD RUTLEDGE OF SOUTH CAROLINA* vii (1997) (“The only previous biography of John Rutledge, Richard Barry’s *Mr. Rutledge of South Carolina* . . ., is unreliable. I have followed the advice of Professor George C. Rogers, Jr., to ignore Barry’s book in writing this biography.”).

161. 2 CONVENTION RECORDS, *supra* note 2, at 370–73 (Aug. 22). That there was a deal is even clearer from the debates of August 28. Madison explicitly notes the fact of the deal in his footnote to the proceedings of August 29. *Id.* at 449.

remarks by two members of the Committee of Detail discussing the importation of slaves:

Mr. Rutledge did not see how the importation of slaves could be encouraged by this section . . . Religion & humanity had nothing to do with this question—Interest alone is the governing principle with Nations . . . If the Northern States consult their interest, they will not oppose the increase of Slaves which will increase the commodities of which they will become the carriers.

Mr. Ellsworth was for leaving the clause as it stands. [L]et every state import what it pleases. The morality or wisdom of slavery are considerations belonging to the States themselves—What enriches a part enriches the whole, and the States are the best judges of their particular interest.<sup>162</sup>

The exact terms of the *quid pro quo* are uncertain: but that there was a deal is not.<sup>163</sup> The fact that Rutledge on the Committee of Detail was able to secure three votes for the “deep South” position strongly suggests that a bargain was already in place by the end of July. If that is so, he could count on both Ellsworth of Connecticut and Randolph of Virginia to support the position of South Carolina.

When we gather together these various pieces of information we arrive at the following broad picture. Randolph was passionate about navigation acts, about restraining the powers of the central government and of the “monarchical” presidency; he was also open to cooperation with Rutledge on the issue of slavery. Rutledge was a zealous defender of slavery and navigation acts; and he had moreover likely already reached an understanding on these matters with the Connecticut delegation, here represented by Ellsworth. He was also a supporter of enumerated federal powers.<sup>164</sup> Ellsworth, too, supported enumerated powers<sup>165</sup> and the right of the Southern

162. *Id.* at 364.

163. Madison’s footnote, *id.* at 364, 369, 414–15, asserts that the deal concerned slavery and navigation. McDONALD, *supra* note 157, at 179–80, criticizes the idea that a supermajority requirement for navigation acts was in the interest of the New England states and argues instead that Connecticut’s western land claims were involved. But why *other* New England states would have entered into an agreement to benefit Connecticut he leaves unexplained. Another possibility (suggested by the remarks of Ellsworth and Rutledge) seems to me more likely: that the New England states feared the loss of shipping revenue if South Carolina and Georgia were to leave the Union.

164. 1 CONVENTION RECORDS, *supra* note 2, at 53 (May 31); 2 CONVENTION RECORDS, *supra* note 2, at 17 (July 16).

165. 1 CONVENTION RECORDS, *supra* note 2, at 53–54 (May 31).

states to set their own position on slavery. He, in turn, was especially passionate about the rights of small states. He put the point in an eloquent speech on June 30:

Under a National Govt. he should participate in the National Security . . . but that was all. What he wanted was domestic happiness. The Natl. Govt. could not descend to the local objects on which this depended. It could only embrace objects of a general nature. He turned his eyes therefore for the preservation of his rights to the State Govts. From these alone he could derive the greatest happiness he expects in this life. His happiness depends on their existence, as much as a newborn infant on its mother for nourishment.<sup>166</sup>

It seems likely, therefore, on the balance of the evidence, that Randolph, Rutledge, and Ellsworth provided three solid votes for a group of interlocking issues: enumerating congressional powers, restraining the national government, limiting the powers of the presidency, requiring a supermajority for navigation acts, protecting slavery, protecting exports, and defending the powers of the state governments.

If this analysis of the situation is correct, then Wilson faced the following predicament. On the one hand, he was by significant distance the most powerful intellect on the Committee—so much so that many historians have simply assumed that he must have dominated the proceedings. On the other hand, on the issues we are considering, he almost certainly found himself outvoted by those three delegates.

What of the final member of the Committee, Nathaniel Gorham? Unlike the others, Gorham was not a lawyer and so would have been in any case a weak ally for Wilson. In the Convention itself he spoke only sporadically and relatively briefly and appears not to have expressed himself on many of the most fundamental issues. But he, too, explicitly favored an enumeration of powers<sup>167</sup>; and he too, although he represented Massachusetts, was sympathetic to small government (and indeed several times suggested that the larger states be split up).<sup>168</sup> When the time came for the debate in August about

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166. *Id.*, at 492 (June 30). The last sentence was inserted by Madison from the notes of Yates.

167. 2 CONVENTION RECORDS, *supra* note 2, at 17 (July 16).

168. 1 CONVENTION RECORDS, *supra* note 2, at 540 (July 6); *see id.* at 462 (recounting Gorham's speech in which he supports small government) (June 29); *see also* 2 CONVENTION RECORDS, *supra* note 2, at 94 (citing Gorham's argument that some of the large states would presumably be split into smaller states). It should be remembered

navigation acts and slavery, Gorham took an intermediate position. He spoke on August 22 against a supermajority requirement for navigation acts;<sup>169</sup> but his comments came at the beginning of the debate and could have been a feint. Three days later, on August 25, came the revealing vote to extend the protection of the slave trade from 1800 to 1808. The vote pitted the states of New England and the deep South against the middle states. Pennsylvania and Virginia voted against the proposal.<sup>170</sup> The motion emanated from South Carolina: and it was seconded by Gorham. Gorham thus emerges as a supporter of the alliance between New England and South Carolina. If that was his position three weeks earlier, then Wilson, far from dominating the Committee, would have been, on the most contentious issues, outvoted by a margin of four-to-one.

How, then, should he respond? On the one hand, to have dissented openly from the final Committee report would have risked re-opening the antagonisms of the preceding weeks and possibly undermined the ability of the Convention to reach agreement on a Constitution.<sup>171</sup> On the other hand, he did not have the votes in Committee to reverse Rutledge's innovations. But such a shrewd strategist must also have seen that several of those innovations could most likely be overturned in Convention. So he apparently decided to bide his time. In the meantime, he would concentrate his efforts on mitigating the effects of the Committee innovations. If that was his strategy, it was a good one. In the closing Act III of the Convention he systematically argued against and defeated the objectionable portions of the Committee Report.<sup>172</sup> We do not know exactly what negotiations occurred between Wilson and the others, or

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that states such as Massachusetts and Virginia were in fact broken into smaller pieces, yielding the states of Maine and Kentucky.

169. 2 CONVENTION RECORDS, *supra* note 2, at 374 ("He desired it to be remembered that the Eastern States had no motive to Union but a commercial one. They were able to protect themselves. They were not afraid of external danger, and did not need the aid of the Southn. States.").

170. *Id.* at 415–16 (Aug. 25).

171. I note in passing that, in the final days of the Convention, the delegates faced great pressure, despite their individual reservations about the Constitution, to give it their public support. There was great effort to try to achieve the appearance of unanimity, and the few non-signers afterwards seem to have been regarded by their fellow delegates as having in a certain measure betrayed the Convention. These pressures for unanimity were greater in the eighteenth century than they are today; and they would have been felt by the members of the Committee of Detail as well as within the Convention as a whole.

172. This topic lies beyond the scope of this paper. For a summary, see Ewald, *supra* note 42, at 993–1003.

whether Wilson threatened to withhold his assent. (As Madison's *Notes* make clear, he was certainly capable of playing the bully, and of making threats "*in terrorem*" against other members.<sup>173</sup>) Whatever the internal dynamics, the next document, Farrand's "Document IX," contains several subtle additions which cumulatively swing the balance back in the direction of a strong national government.

#### F. DRAFT IX

Draft IX is the longest of the Wilson drafts—twenty-two pages of writing in six of his folded folio signatures. The draft begins with Wilson's "We the People of the States," taken from Document V. This draft, like the Randolph draft, contains marginalia in the hand of John Rutledge. Some of the Rutledge alterations are merely stylistic, but many involve matters of substance. For that reason, it seems most likely that these changes were introduced at a Committee meeting, with Rutledge in the chair.<sup>174</sup> The draft retains the problematic provisions from earlier drafts: our concern is now with the new items. The most important involve the executive and, above all, the system of federal-state relations.

##### 1. The Federalism Clauses

As we saw, it was not the Convention as a whole, but the Committee of Detail that formulated the textual provisions that lie at the heart of American federalism: the enumeration of federal powers, the Necessary and Proper Clause, the restrictions on the powers of the states, and the supremacy clause. Each of these provisions has a complex intellectual history, both before and after the Convention. It is in Document IX that they for the first time coalesce with the Draft IV provisions on federal courts to form a recognizable system of federal-state relations;

173. 1 CONVENTION RECORDS, *supra* note 2, at 123, n.\* (June 5).

174. There are some subtle matters that raise questions about the process of drafting. Wilson originally provided (in conformity with draft VI/VIII) that the qualifications of the electors of the legislature were to be prescribed by the legislatures of the states, subject to a congressional override. He deleted this passage; his replacement provides that the qualifications in each state are to be the same as those for the most numerous branch of the state legislature, and (I presume reluctantly) drops the override provision. There is a check mark beside the change, apparently by Wilson. Wilson later explained to the Convention that this provision had been carefully considered by the Committee, which suggests that he, too, and not just Rutledge, at times marked up the drafts during the Committee discussions. 2 CONVENTION RECORDS, *supra* note 2, at 201 (Aug. 7).

and in this document they reach their near-final form. The next several weeks were to add refinements, but the core remained remarkably unchanged. It is not my purpose here to discuss the broader intellectual history. The task is rather to focus on the work of the Committee itself—to try to understand (as far as the documents permit) how these provisions were assembled, by whom, and with what intent.

a. Overview: “Resolution VI”

I begin with some preliminary points.

Let us begin by considering more closely the powers assigned by the Convention to the national government. Broadly speaking, the delegates had a choice between several models.

The first was the model of the Articles of Confederation. Here three ingredients are central. First, the Articles provide in Article II that “Each state retains its sovereignty . . . and every Power . . . which is not by this confederation expressly delegated” to Congress. Article IX then enumerates the powers of the Confederation Congress. (This enumeration, as we saw, provided most of the items for Randolph’s enumeration in Draft IV.) Finally, in what might be called a “quasi-supremacy” clause, Article XIII provides that “Every State shall abide by the determination of [Congress], on all questions which by this confederation are submitted to them. And the Articles of this confederation shall be inviolably observed by every State . . . .”

The state constitutions, in contrast, followed a variety of patterns. Many contained no explicit grant of legislative power at all: for instance, George Mason’s Virginia Constitution of 1776 provides that “[t]he legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other.” But Mason leaves any further specification of those powers entirely tacit.<sup>175</sup> Other constitutions contained an enumeration supplemented by a general grant of legislative authority. The Pennsylvania Constitution of 1776 is an example. It lists a number of explicit legislative powers, then concludes with a broad “necessity clause,” stating that the legislature “shall have all other powers necessary for the legislature of a free state or commonwealth: But they shall have no power to add to, alter, abolish, or infringe

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175. 7 THORPE, *supra* note 67, at 3815; MASON PAPERS, *supra* note 62.



any part of this constitution.”<sup>176</sup> The formulation in the Massachusetts Constitution of 1780 is extremely convoluted. It lists some legislative powers; then grants the broad general authority to make “all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth . . . .”<sup>177</sup>—and then, in a continuation to the same long sentence, goes on to list various other explicit powers. These three state constitutions were well known to the members of the Convention, as of course were the Articles.

At this point, we must consider the scholarly controversy concerning “Resolution VI.” It is sometimes said—historically, it is the dominant view—that the Convention as a whole considered a broad grant of power, stated in Resolution VI of the Virginia Plan, but ultimately rejected this language in favor of an explicit enumeration. Hueston goes further, arguing that the Convention itself actually adopted a broad grant, but that the states’ rights advocates on the Committee of Detail circumvented its instructions, thereby “altering the course of the Convention.”<sup>178</sup> More recently a group of constitutional scholars, also noticing that the Convention explicitly adopted a variant of Resolution VI and included it in the Convention resolutions, sees the work of the Committee not as a subversion of Resolution VI, but as an attempt to carry it into effect.<sup>179</sup> The point is stated by Jack Balkin. Resolution VI, he says,

was the *animating purpose* of the list of enumerated powers that appeared in the final draft, and it was the key explanation that framer James Wilson offered to the public when he defended the proposed Constitution at the Pennsylvania ratifying convention. . . . As Wilson explained, the purpose of enumeration was not to *displace* the principle, but to *enact* it[.]<sup>180</sup>

176. 5 THORPE, *supra* note 67, at 3085.

177. 3 THORPE, *supra* note 67, at 1894.

178. Hueston, *supra* note 36, at 767, 770.

179. Kurt Lash provides a list of “Resolution VI” scholars, including Akhil Amar, Jack Balkin, Robert Cooter, Andrew Koppelman, and Neil Siegel; he also documents the increasing use of Resolution VI in briefs filed before the Supreme Court. Kurt T. Lash, *‘Resolution VI’: National Authority to Resolve Collective Action Problems Under Article I, Section 8*, ILLINOIS PUBLIC LAW AND LEGAL THEORY RESEARCH PAPERS SERIES NO. 10–40 2 (Jan. 2012).

180. JACK BALKIN, *LIVING ORIGINALISM* 145 (2011); this quotation forms part of a

In other words, we can distinguish three models for the enumeration:

- (i) an *express* enumeration of powers (as in the Articles), with a presumption that any power not thus “expressly delegated” is retained by the states;
- (ii) an *explicit* enumeration of powers, but with the powers themselves being broadly construed under a necessity clause; on this view, Resolution VI served in the debates as a placeholder, but was fully discharged when the final enumeration and necessity clause was adopted; or,
- (iii) an *illustrative* enumeration of powers, with the powers not exhausting the grant, but being supplemented by the principle of Resolution VI.<sup>181</sup> On this view, the enumeration serves as a kind of placeholder for Resolution VI, whose underlying principle remains operative.

The work of the Committee is central to this issue, and the role of Wilson is likely to have been pivotal. Hamilton excepted, he was probably the most ardent nationalist at the Convention. And he stands in a particularly close relationship to Resolution VI.

At this point we need to take account of an extremely perceptive observation about Wilson recently made by John Mikhail.<sup>182</sup> Wilson came to the Convention with considerable experience as a constitutional litigator. In particular, he had thought deeply about the constitutionality of the establishment of a national bank under the Articles of Confederation. This much is well known; but Mikhail’s important observation is that the specific language of Resolution VI likely comes, not (as had previously been assumed) from Madison’s pre-Convention writings but from Wilson’s *Considerations on the Bank of North America*, published in 1785.<sup>183</sup> Mikhail’s argument, based both on linguistic similarities and on the absence of the relevant portions

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wider discussion of Resolution VI directed largely against the position of Randy Barnett. *Id.* at 143–49. Balkin’s historical argument has been severely criticized by Lash, *supra* note 179, *passim*.

181. The term “illustrative” I borrow from Calvin H. Johnson, *The Dubious Enumerated Powers Doctrine*, 22 CONST. COMMENT. 25 (2005).

182. John Mikhail, *The Necessary and Proper Clauses, Part 2: Foregoing Powers v. All Other Powers*, BALKINIZATION (Aug. 22, 2011), <http://balkin.blogspot.com/2011/08/necessary-and-proper-clauses-part-2.html>. Mikhail, for good analytical reasons, breaks the Necessary and Proper Clause into three distinct clauses; this refinement is not necessary for the more limited analysis given here.

183. Reprinted in JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 60 (Kermit L. Hall & Mark David Hall eds., 2007).

of Resolution VI from Madison's earlier writings, is persuasive, as is his conjecture that Wilson's language was adopted into the Virginia Plan when the Pennsylvania and Virginia delegations met before the opening of the Convention. Mikhail's wider argument about the Necessary and Proper Clause is subtle and important and cannot be explored here. But the importance of his observation to our present topic should be evident. At the very least, Mikhail has established that Wilson had publicly and conspicuously argued for a broad constitutional principle in language nearly identical to Resolution VI; and that fact is relevant to our understanding of the formulation of the Necessary and Proper Clause in Document IX.

One final point. As we proceed, it is important not to treat the various federalism clauses in isolation from one another. They were intended to form a system; and (although full proof is impossible) it is reasonable to think of the new elements in Draft IX as a Wilsonian rejoinder to the earlier drafts.

b. Enumeration of Powers

Let us start with enumeration of powers; as we saw, the Randolph enumeration made its first appearance in Draft IV.

The issue of enumeration had arisen several times in the course of the Convention, and on those occasions members of the Committee of Detail expressed their views. Resolution VI of the Virginia Plan was introduced by Randolph on May 29. The relevant portion stipulated:

that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.<sup>184</sup>

When Resolution VI came up for discussion on May 31, Rutledge and Charles Pinckney "objected to the vagueness of the term *incompetent*, and said they could not well decide how to vote until they should see that an exact enumeration of the powers comprehended by this definition."<sup>185</sup> (This is all Madison tells us; he does not distinguish the speech of Rutledge from that of Pinckney.) Pierce Butler then "repeated his fears that we

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184. 1 CONVENTION RECORDS, *supra* note 2, at 21.

185. *Id.* at 53 (May 31).

were running into an extreme in taking away the powers of the States, and called on Mr. Randolph[h] for the extent of his meaning.”

Challenged thus vigorously, Randolph, who had introduced Resolution VI in the first place, gave his explanation of its meaning. The quotation is important, for it inevitably influenced the Convention’s understanding, not just of Resolution VI, but of the role it was to play in their own deliberations.

Randolph explained that he “disclaimed any intention to give indefinite powers to the national Legislature.” Indeed, in characteristic fashion he declared his inflexibility, stating

that he was entirely opposed to such an inroad on the State jurisdictions, and that he did not think any considerations whatever could ever change his determination. His opinion was fixed on this point.<sup>186</sup>

There is no good reason to doubt his statement: after all, it was partly on this issue that he refused to sign the Constitution.<sup>187</sup>

As for Madison on that day, his own *Notes* report:

Mr. Madison said that he had brought with him into the Convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national Legislature; but had also brought doubts concerning its practicability. His wishes remained unaltered; but his doubts had become stronger. What his opinion might ultimately be he could not yet tell.<sup>188</sup>

According to the notes of Pierce, Madison admonished the Convention, saying “it was necessary to adopt some general principles on which we should act,—that we were wandering from one thing to another without seeming to be settled in any one principle.”<sup>189</sup> Pierce also reports that, towards the end of the discussion, Randolph, Wilson, and Madison all expressed their doubts about the possibility of an enumeration.<sup>190</sup> But Randolph (if Pierce records him correctly) adds an important qualifier: the enumeration, he said, was impossible “just at this time.” After these discussions, the Convention voted to adopt Resolution VI.

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186. *Id.*

187. 2 CONVENTION RECORDS, *supra* note 2, at 489, 563–64.

188. 1 CONVENTION RECORDS, *supra* note 2, at 53 (May 31).

189. *Id.* at 60.

190. *Id.* The remark of Wilson’s is similar to those of Randolph and Madison: “Mr. Wilson observed that it would be impossible to enumerate the powers which the federal Legislature ought to have.” His remark is not recorded in Madison’s *Notes*.

Only Roger Sherman, generally considered the strongest defender of the powers of the states, is recorded as having voted against.

The evidence here is far from conclusive. The Convention adopted Resolution VI of the Randolph Plan, but only after Randolph had forcefully stated his understanding of what it entailed. It might be that Wilson or Madison favored a broad grant of power, with no enumeration; but, if so, their position (at least as reported by Madison) is hardly expressed with the clarity of which they were capable. The evidence, such as it is, appears to me stronger that the Convention accepted Randolph's emphatic declaration and regarded Resolution VI as a temporary placeholder, operative "just at this time," with details to be filled in later. This is one of those many places where one would like to know more, but where the evidence runs out.

It is worthwhile to notice that Madison, in a long and careful letter to John Tyler written many years later, discusses the relevant portion of Resolution VI, saying of the phrases about "state incompetence" and the "harmony of the United States":

It can not be supposed that these descriptive phrases were to be left in their indefinite extent to Legislative discretion. A selection & definition of the cases embraced by them was to be the task of the Convention. If there could be any doubt that this was intended, & so understood by the Convention, it would be removed by the course of proceedings on them as recorded, in its Journal.<sup>191</sup>

One must of course treat subsequent recollections with caution; but Madison does appear to be accurately reporting the understanding of the Convention.

On July 7, in the middle of the "great debate," the issue of enumeration briefly resurfaced. Elbridge Gerry suggested that the Convention now attempt an enumeration. Madison replied that such an enumeration could not yet be made—not at this stage in the proceedings, before the issue of representation in the second branch of the legislature had been settled.<sup>192</sup> He did not reject the idea of an enumeration as such.

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191. 3 CONVENTION RECORDS, *supra* note 2, at 526–27. (Letter of Madison to John Tyler, internally dated to 1833, and probably never sent.)

192. 1 CONVENTION RECORDS, *supra* note 2, at 551 ("Mr. Madison, observed that it wd. be impossible to say what powers could be safely & properly vested in the Govt. before it was known, in what manner the States were to be represented in it.").

There matters rested throughout the rest of the great debate. On July 16, immediately after the vote on the “Connecticut Compromise,” the issue arose again. Madison, who had just suffered a crushing defeat, was no doubt distracted, and his *Notes* for that day are terse. The Convention was again asked to consider Resolution VI:

Mr. Butler calls for some explanation of the extent of this power; particularly of the word *incompetent*. The vagueness of the terms rendered it impossible for any precise judgment to be formed.

Mr. Ghorum [*sic*]. The vagueness of the terms constitutes the propriety of them. We are now establishing general principles, to be extended hereafter into details which will be precise & explicit.

Gorham’s remark here as recorded by Madison is not entirely transparent; but he, like Randolph and the rest of the Convention, appears to have expected and favored an enumeration at some later point in the proceedings. His remarks were immediately followed by Rutledge:

Mr. Rutledge, urged the objection started by Mr. Butler and moved that the clause should be committed to the end that a specification of the powers comprised in the general terms, might be reported.<sup>193</sup>

Immediately after this exchange, Randolph, himself still smarting from the vote on the “Connecticut Compromise,” asked that the Convention be adjourned.<sup>194</sup>

The next day, Roger Sherman, who in the debate of May 31 had been the only delegate to vote against Resolution VI, now suggested the Convention adopt a different formula. Madison’s *Notes* are still somewhat sketchy and the portions in brackets he later filled in from the (itself not always reliable) official *Journal*:

Mr. Sherman observed that it would be difficult to draw the line between the powers of the Genl. Legislatures, and those to be left to the States; that he did not like the definition contained in the Resolution, and proposed in place of the words ‘of individual legislation’ line 4 inclusive, to insert, ‘to make laws binding on the people of the <United> States in all cases <which may concern the common interests of the

193. 2 CONVENTION RECORDS, *supra* note 2, at 17 (July 16).

194. *Id.* at 18; challenged, he quickly explained that he meant an adjournment only for the day and not permanently. *See also supra* note 72 and accompanying text (noting Randolph’s foul mood after his own ideas of compromise were rejected).

Union>; but not to interfere with <the Government of the individual States in any matters of internal police which respect the Govt. of such States only, and wherein the General> welfare of the U. States is not concerned.’<sup>195</sup>

The passage must be read with care. If Madison’s account is accurate, Sherman’s motion would have eliminated only the tail end of Resolution VI (which, recall, read: “to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.”). It is not altogether clear what is being proposed, or what phrases would be replaced by what. Sherman clearly wishes to protect the “internal police” of the States from federal interference. The notes of John Lansing for that day observe that “Mr. Sherman in the course of his Remarks observed that the general Government could only have the Regulation of Trade and some other matters of general Concern and not to all the Affairs of the Union.”<sup>196</sup> The scholarship on Resolution VI generally treats Sherman as the great, stubborn defender of the powers of the States and Wilson as the great nationalist, favorable to a broad grant of power. In addition, these two delegates had, until the day before, been locked in bitter dispute. But now Madison tells us that “Mr. Wilson 2ded the [Sherman] amendment as better expressing the general principle.”<sup>197</sup> The entire passage is perplexing, and one suspects that something important has been left out.

But the discussions continued. When it became clear (in response to the prodding questions of Gouverneur Morris) that Sherman’s proposal would not allow for direct taxation, it was voted down by the Convention, 2–8. (Wilson’s vote is not separately recorded, but the Pennsylvania delegation voted with the majority.)

Gunning Bedford then moved to alter the language of Resolution VI as follows, inserting the language in italics:

to legislate in all Cases *for the general Interests of the Union, and also in those* to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.

A worried Randolph remarked: “This is a formidable idea indeed. It involves the power of violating all the laws and

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195. *Id.* at 25 (July 17).

196. SUPPLEMENT, *supra* note 2, at 56 (June 6).

197. 2 CONVENTION RECORDS, *supra* note 2, at 26 (July 17).

constitutions of the States, and of intermeddling with their police.” After Bedford provided assurances that the new language was no more “extensive or formidable” than Randolph’s original proposal, the Bedford amendment was adopted by the Convention, 8–2.<sup>198</sup> It was Bedford’s version of Resolution VI (with slight stylistic modifications) that made its way to the Committee of Detail.

These various passages are too brief for us always to draw firm conclusions about the intent of the delegates; but the following points seem likely. First, the Convention as a whole pretty clearly rejected the “expressly delegated” language of the Articles: so far as can be seen without dissent. In the Virginia ratification debates, Randolph argued that the language had been “destructive” to the Union: even the passport system had been difficult to justify.<sup>199</sup> Secondly, most delegates appear to have believed (Randolph, Rutledge, Gorham definitely, and probably both Madison and Wilson) that the vague grant of the Virginia Plan would eventually have to be replaced with a more specific enumeration. Thirdly, although some delegates (notably Madison and Wilson) may have hoped as well for a general grant of legislative power, they appear not to have argued for such an outcome—perhaps because they were still working for the adoption of Madison’s national veto, which would have accomplished some of the same ends. And finally, if the entire Convention had intended a broad, general grant of national power, and if an enumeration had been seen as incompatible with such a grant, then one would have expected the Committee’s Report to be met with protests. But there were no such protests. If the *Notes* are correct, when the Committee Report was presented, the idea of an enumeration was accepted without a murmur. These facts may all be granted; but they still leave open the question of whether the enumeration was understood by the Convention to be exhaustive or illustrative.

Randolph’s enumeration in Draft IV needs to be seen in light of this entire history. He had always favored an explicit listing of the national legislative powers. There is no reason to suspect him of acting *ultra vires* or of attempting to deceive the Convention. After all, the Articles of Confederation contained an enumeration, and the Convention had explicitly resolved, as part of Resolution VI itself, “That the Legislature of the United

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198. 2 CONVENTION RECORDS, *supra* note 2, at 26–27 (July 17).

199. See Johnson, *supra* note 181, at 39–42.



States ought to possess the legislative Rights vested in Congress by the Confederation . . . .”<sup>200</sup> As we have already seen, the enumeration in the Articles was the principal source for Randolph’s enumeration.<sup>201</sup> The Convention had also, in the Bedford resolution, charged the Committee to add additional powers in areas where the states were “incompetent.” Here, too, Randolph complied with instructions, explicitly adding the powers to tax and to regulate commerce. Neither power was in the least controversial: even Roger Sherman supported both, as did the New Jersey Plan. If Randolph departed from expectations, he did so in the direction of minimalism. His enumeration granted to the national government virtually the shortest list of powers compatible with the instructions of the Convention.<sup>202</sup>

c. Necessary and Proper

We now need to ask: What did Wilson think of all this? What was his attitude towards the enumeration in the Randolph Draft? I take it to be clear that he accepted the principles embodied in Resolution VI, before, during, and after the Convention, and agree with Mikhail that he either inspired the language or wrote it. But to accept the principle of Resolution VI is not necessarily to think that Resolution VI would serve as good constitutional text. Randolph Madison, and Gorham accepted the principle while explicitly declaring it to be a placeholder for something more precise: Madison in 1833 treats the point as obvious. Was Wilson’s attitude different? Perhaps; but I see no clear evidence that it was. True, he expressed doubt about the feasibility of an enumeration: but so did Randolph and Madison. He was not shy about voicing contrary opinions; yet he never—so far as Madison’s *Notes* reveal—objected to enumeration on principle. There is no sign that he recoiled from Randolph’s list, or that he pressed for additional powers to be included. Moreover, even in his earliest writings on parliamentary sovereignty, and subsequently in his opposition to the Pennsylvania Constitution of 1776, he repeatedly warned

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200. See *supra* note 184 and accompanying text.

201. See *supra* notes 87–89 and accompanying text.

202. Similarly for his drafting of the provisions concerning the federal courts. The Convention language had said that the courts were to have jurisdiction over “such other Questions as involve the national Peace and Harmony”; Randolph took this vague formulation and made it precise. It is unlikely that he saw his enumeration any differently.

that legislatures could be as tyrannical as Kings: a caution against thinking he would have favored writing the text of Resolution VI into the Constitution.

Against this interpretation might be mentioned the Pennsylvania Constitution of 1790, of which he was the leading drafter. In his *Lectures on Law* from 1792 he noted that the American Constitution contains no broad grant of powers, whereas the Constitution of Pennsylvania vested the general assembly “with every power necessary for a branch of the legislature of a free state.”<sup>203</sup> Of this contrast, Wilson says only, “The reason is plain. The latter institutes a legislature with general, the former, with enumerated, powers.”

And then there is the curious matter of Wilson’s endorsement of Sherman’s motion as “better expressing the sense” of Resolution VI. Wilson’s remark is perhaps not as surprising as it first appears. Sherman proposed little more than that matters affecting the union should be handled at the national level, whereas matters affecting solely the states should be handled by the states. So long as it was understood that this formula, too, was a placeholder, and that the all-important details remained to be specified, there was no reason for Wilson not to endorse the motion.

In other words, I see no ground to think that Wilson would have seen Randolph’s enumeration as illegitimate. But still, there was a problem. The balance between state and federal power needed to be calibrated correctly, and the provisions so far adopted by the Committee would almost certainly have struck Wilson as tilting things too much toward the states. This brings us to the necessary and proper clause, which I take to be his response.

The Randolph draft (Document IV) contains numerous provisions in the handwriting of Rutledge. Presumably, these were made during the course of a Committee meeting, with Rutledge presiding. He inserted into the enumeration a clause prohibiting the states from emitting paper bills of credit, and then, quickly scrawled across the top of the next page, “That Trials for Crim<sup>l</sup>. Offenses be in the State where the Off<sup>e</sup> was com<sup>d</sup>—by Jury—And a right to make all Laws necessary to carry the foregoing Powers into Execu —.”<sup>204</sup> This scribble is the first

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203. WILSON, *supra* note 183, at 870. Wilson misquotes slightly; for the actual text, see THORPE, *supra* note 67, at 3094.

204. 2 CONVENTION RECORDS, *supra* note 2, at 144; COMMITTEE DOCUMENTS,

version of what was to evolve into the Necessary and Proper Clause.

It is not possible to say which Committee member or members instigated the inclusion of such a clause; but we can make a guess. Randolph can almost certainly be ruled out. On September 10 he listed as one of his principal reasons for not signing the Constitution “the general clause concerning necessary and proper laws.”<sup>205</sup> The formulation of the clause in Draft IV is weaker than the final version in Draft IX,<sup>206</sup> and might not have been as objectionable to Randolph; still, it is hard to imagine that he instigated even the weaker version. Rutledge was almost as skeptical about unrestricted national power as Randolph: he, too, is an unlikely candidate. Ellsworth, who appears never to have spoken on this issue, is something of a cipher; and Gorham is not enough of a lawyer.

The likeliest candidate is therefore Wilson. Of the Committee members, he is the one most sympathetic to national power. Moreover, in Document V—his brief initial sketch, likely written before the Committee first met—his outline indicates that he planned “To treat of the Powers of the legislative” and then “To except from those Powers certain specified Cases.” These remarks are elliptical: but it sounds as though he was thinking in terms of a more general grant of powers that would then be limited by specific restrictions.

We do not know the precise form the necessity clause took in Draft VI/VIII—it would have been on the missing folio sheet. The original scrawled version in Document IV had spoken only of “a right to make all Laws necessary to carry the foregoing Powers into Execu –.” In Draft IX this idea appears in a significantly stronger form: “to make all Laws that shall be necessary and proper for carrying into ~~full and complete~~ Execution ~~the foregoing Powers, and~~ all other Powers vested, by this Constitution, in the Government of the United States, or in any Department or Officer thereof.” The second cancelled expression was restored in the printed Committee Report, and (with some minor alterations to punctuation and capitalization) the entire clause made its way into the final text of the Constitution. The physical page here is almost a fair copy. The quoted passage seems to have been smoothly and fully written

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*supra* note 20, at 277.

205. 2 CONVENTION RECORDS, *supra* note 2, at 563 (Sept. 10).

206. Mikhail rightly emphasizes this point; *supra* note 182.

out, without interlineations, before the deleted words were crossed out. (I presume, on a matter of this importance, that Wilson did not first write the cancelled phrase, then continue with the rest as an afterthought. Incidentally, although the page contains some marginalia by Rutledge, the cancellations here appear to be Wilson's.) That Wilson on this page tinkered with the formulation is perhaps another small hint of authorship.<sup>207</sup>

At this point we must be careful not to attribute to Wilson and the members of the Committee greater foresight than in 1787 they could have possessed. Wilson may perhaps have hoped that the Necessary and Proper Clause would open the door to an expansive view of national powers. He may perhaps have hoped that it would cause the enumeration to be understood to be illustrative rather than exhaustive. But there is no clear evidence that he analyzed matters in these terms. The surviving evidence even for Wilson—let alone for the Convention as a whole—is patchy and inconclusive. It should be remembered that the specific “necessary and proper” terminology was novel; the public understanding of the clause was unpredictable; *McCulloch* still lay far in the future; and, for all anybody could tell, the clause might have been construed narrowly. One thinks of the Privileges and Immunities Clauses, or the guarantee of republican government. That the interpretation of the clause was contested for so long, pitting constitutional thinkers of the stature of Jefferson and Madison against Hamilton and Marshall, is a warning that the mere act of drafting the language still left a great deal unsettled. To us, after more than two centuries of constitutional history, it is obvious that the strong version of the Necessary and Proper Clause is fundamental. But it might not have seemed that way at the time. I note in passing that Wilson’s chapter “Of the Legislative Department” in his *Lectures* scarcely mentions the clause. Almost as an afterthought, he mentions only the narrow version of the clause,

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207. I note in passing one further point. The famous interpretation of the Necessary and Proper Clause in Chief Justice Marshall’s opinion in *McCulloch v. Maryland*, 17 U.S. 316 (1819), follows the analysis provided by Hamilton in his memorandum concerning the constitutionality of a national bank, submitted to Washington in February, 1791. The bank itself Hamilton had proposed in his *Report on a National Bank*, submitted to Congress in December, 1790. A full copy of that lengthy *Report*, in Hamilton’s handwriting, is among the Wilson papers at the Historical Society of Pennsylvania. It is suggestive that the argument about the constitutionality of the bank turned on the interpretation of the Necessary and Proper Clause, and that Hamilton, as a former member of the Convention, knew of the role Wilson had played; but the precise nature of their communications cannot be further reconstructed. For further details, see Ewald, *supra* note 42, at 908–10.

granting it two sentences in the penultimate paragraph and saying only that it was intended to insure that the enumerated powers not be “nugatory.”<sup>208</sup> One has the impression that many other matters struck him as more important.

d. Supremacy

With enumeration and the Necessary and Proper Clause behind us, the remaining federalism provisions can be handled more rapidly.

The development of the Supremacy Clause took a strange trajectory. The Articles of Confederation contained in Article XIII what might be called a “quasi-supremacy clause,” declaring that the states were to abide by decisions of Congress, and were to observe the Articles themselves “inviolably.” But this somewhat overly-optimistic formulation left no scope for adjudication of difficult cases and no mechanism for enforcement. At bottom, the system depended on voluntary compliance by the states. The Virginia Plan had sought to deal with this issue by two devices: (i) a national veto by Congress over the state legislatures; and (ii) the power of the Congress to call forth the national military to force recalcitrant states into line. Madison appears to have drafted both provisions; but even he almost immediately expressed serious reservations about the second.<sup>209</sup> Nevertheless, it appears to have been universally agreed that some sort of strengthening of the national powers was called for, and the New Jersey Plan (introduced in June 15) proposed the following language:

Resd. that all Acts of the U. States in Congr. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding . . . .<sup>210</sup>

Curiously, the New Jersey Plan also provided for calling forth the power of the national military. In response, Randolph objected that the proper remedy was not military coercion, but a

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208. WILSON, *supra* note 183, at 872.

209. 1 CONVENTION RECORDS, *supra* note 2, at 54 (May 31).

210. *Id.* at 245 (June 15).

national government acting directly on individuals.<sup>211</sup> After the rejection of the New Jersey Plan, the Convention returned to the Virginia Plan and for the next month was consumed by the “great debate” over proportional representation. A month later, the day after the “Connecticut Compromise,” the Convention voted to reject the Madison national veto. In its stead, Luther Martin moved to reinstate the language quoted above from the New Jersey Plan, language which (with a few inconsequential changes) was incorporated into the Convention resolutions forwarded to the Committee of Detail.<sup>212</sup> The language appears in Wilson’s Draft IX, but with one major change: “any Thing in the Constitutions or Laws of the several States to the Contrary notwithstanding.”<sup>213</sup> It is possible that Paterson and Martin had deliberately formulated the original language so as to permit the states to preserve their autonomy; but some Committee member with a sharp eye plugged the gap. As with the Necessary and Proper Clause, the likeliest suspect is Wilson.

e. Restrictions on the States

The Convention resolutions had not contained a list of enumerated powers; nor did they contain a list of restrictions on the states. Just as the Randolph draft had looked to the Articles of Confederation for its list of enumerated powers, so Draft IX looks to the same source (Article VI) for a list of prohibitions on the states. This was the first version of what would eventually become Article I, §10. Most of these restrictions were taken more-or-less directly from the Articles, and did not provoke controversy when the Committee reported them back to the

211. *Id.* at 256 (June 16).

212. COMMITTEE DOCUMENTS, *supra* note 20, at 245. In the Randolph draft, a Supremacy Clause appears in Rutledge’s hand, and reads as follows: “All laws of a particular state, repugnant hereto, shall be void, and in the decision thereon, which shall be vested in the supreme judiciary, all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle.” 2 CONVENTION RECORDS, *supra* note 2, at 144; COMMITTEE DOCUMENTS, *supra* note 20, at 277. This text was for some reason then struck out. I note the extraordinary awkwardness of the formulation, which is characteristic of Rutledge—and which provides at least a minor indication that Wilson was responsible for most of the actual drafting of the far more lucid Committee Report.

213. 2 CONVENTION RECORDS, *supra* note 2, at 169. Wilson’s full version reads:

The Acts of the Legislature of the United States made in Pursuance of this Constitution, and all Treaties made under the Authority of the United States shall be the supreme Law of the several States, and of their Citizens and Inhabitants; and the Judges in the several States shall be bound thereby in their Decisions, any Thing in the Constitutions or Laws of the several States to the Contrary notwithstanding.

*Id.*

Convention.<sup>214</sup> No doubt most delegates took it for granted that the prohibitions contained in the Articles would continue. The most significant change is the inclusion of a prohibition on coining money or issuing paper bills of credit. This was not controversial at the Convention, though it engendered debate in some of the state ratifying conventions. Wilson certainly favored such a restriction; but so did most of the other delegates, and the matter first appears in the Randolph draft, inserted in Rutledge's handwriting. There is no reason to attribute this change to any Committee member in particular.<sup>215</sup>

#### f. Miscellaneous Federalism Provisions

Draft IX also contains three further provisions relating to federalism. The first is in Wilson's handwriting: a guarantee to each state of a republican form of government. This provision had been specified in the Convention resolutions, and Wilson simply adopted the language with minor changes. In the margin, in Rutledge's handwriting, is a version of the privileges and immunities clause, and the notation, "Full Faith & Credit &c."<sup>216</sup> Neither of these provisions had been formally discussed in the

214. The principal points taken from the Articles—sometimes with modifications to the language—are as follows: The states are prohibited from entering into treaties of alliance with foreign powers or other states; from imposing duties on imports; from keeping troops or ships in time of peace; from issuing letters of marque and reprisal; from engaging in war; and from granting titles of nobility. *Id.*

215. The Articles of Confederation had granted Congress the power (by a supermajority of nine votes) to coin money and (by a simple majority) to regulate the alloy of coin struck by the states. The Articles did not prohibit the states from coining money nor from issuing paper currency. This was of course an issue of fundamental importance—socially divisive and one of the principal reasons, much discussed by Beard and the progressive historians, for the calling of a Constitutional Convention. Already in 1786 Madison was denouncing the "folly" of paper money, which was at the heart of his famous list of "Vices". MADISON, *Vices of the Political System of the United States*, in 9 MADISON PAPERS, *supra* note 56, at 349. See generally Mary M. Schweitzer, *State-Issued Currency and the Ratification of the U.S. Constitution*, 49 J. ECON. HIST. 311 (1989) (detailing the critical nature of the paper money supply within the United States at the time of ratification). The Randolph draft shows numerous insertions and deletions on this point, mostly in the hand of Rutledge, but in essence gave to Congress the exclusive right to coin money and prohibited the states from issuing paper money unless authorized by Congress. The idea was already contained in the Pinckney Plan, which the Committee had at its disposal; but there is no reason to think that Rutledge or Randolph could not have come up with the prohibitions for themselves. Draft IX essentially adopted the Randolph position, which made its way into the final Committee Report. Wilson himself would have gone further. When the proposal was debated in Convention on August 28, he favored making the prohibition on the issuance of paper money by the states absolute. 2 CONVENTION RECORDS, *supra* note 2, at 439.

216. 2 CONVENTION RECORDS, *supra* note 2, at 174; COMMITTEE DOCUMENTS, *supra* note 20, at 361. Farrand mistakenly does not record that the insertions are in Rutledge's hand.

Convention; both were taken (via Charles Pinckney) from the Articles of Confederation. Both found their way into the Committee Report and thence into the Constitution.

This has been a long analysis of the federalism provisions; let me pull together the main threads. It seems to me that behind the Committee documents we can discern a subtle tug-of-war, with the initial Randolph-Rutledge drafts favoring state power, and Draft IX taking a more Wilsonian position. I believe the strong Necessary and Proper Clause, the prohibitions on the states, and the formulation of the Supremacy Clause to be primarily Wilson's handiwork. But full proof is impossible; and in any case the point should not be exaggerated. Wilson would have needed to secure at least two other committee votes; and as I argued, the differences between himself and Randolph (or even Roger Sherman) are hardly an unbridgeable chasm.<sup>217</sup>

## 2. The Executive

Let us briefly recall the treatment of the executive in the Randolph Draft. The Convention resolutions had stipulated as the powers of the executive only "the power to carry into Execution the national Laws," the power to appoint officers "in cases not otherwise provided for," and the veto power. Randolph, in keeping with his distrust of the executive as the

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217. Let me here briefly indicate my position on the "Resolution VI" controversy, *supra* note 180 and accompanying text. It seems to me that there are some factual slips and omissions in Balkin's account of Resolution VI, but that they do not vitiate his larger argument. He is correct that Resolution VI (as amended by Bedford) was settled upon as a statement of the general principle the Convention wished the Committee of Detail to discharge: even on the "placeholder" view, this is clearly true. It is equally true that Randolph and Wilson understood themselves to be carrying out the Convention's instructions: Mikhail's observation only strengthens the point.

Everything now turns on what it means to "discharge" Resolution VI. Crudely put, there are two choices. (1) One might view Resolution VI as mere scaffolding, a temporary structure to be dismantled and discarded once the task is complete. On this view, once the enumeration of powers and the Necessary and Proper Clause have been adopted, Resolution VI has been discharged without residue and has no further role to perform. (There are of course areas of law where such a view is almost a precondition of sanity: one does not wish to argue every issue of tax law from first principles.)

(2) On the other view, Resolution VI retains a residual use. Explicitly adopted by the Convention as a statement of what they intended the enumeration of powers to accomplish, it is now available, on originalist grounds, as an interpretive principle for understanding the powers listed in the enacted text.

Historical facts about the Convention cannot settle this matter; indeed, although the delegates did not formulate the choice in this way, it is reasonably clear that Randolph would have inclined to the first view and Wilson to the second. My own view (which I shall not argue) is that the second view is the more defensible. But that is now a claim of legal philosophy, not of history; and to that extent the historical criticisms of Balkin misunderstand the argument.



“foetus of monarchy,” provided that the executive was to be elected by Congress and to be ineligible for a second term. The Convention to this time had not discussed the question of who was to control foreign affairs. Randolph’s original Draft IV assigned the principal powers (over treaties and appointment of ambassadors) to the Senate: the executive only had the right to receive ambassadors. Randolph indeed at one point had suggested that the Senate ought to be perpetually in session, “perhaps to aid the executive.”<sup>218</sup> On his conception the chief executive was to be kept weak and many executive functions performed by the Senate.

The Rutledge annotations (presumably reflecting the work of the Committee) considerably strengthen the list of powers, and it is likely that Wilson, the most vigorous advocate at the Convention for a strong presidency, was in the forefront of the changes. The executive is now the commander-in-chief of the state militias and of the national military; has his salary placed beyond legislative control; is given an enhanced appointment power; is authorized to make recommendations to Congress; and is given the power to pardon.<sup>219</sup> None of these changes would have been congenial to Randolph.

We do not possess the folio sheet for the executive in Draft VI/VIII. Our next glimpse is Draft IX; Wilson, working from this enhanced list (and relying at many points on the linguistic formulations in the Pinckney Plan) worked up a recognizable first version of what was to become Article II, Sect. 2 of the Constitution. In particular, he began with the words: “The Executive Power of the United States shall be vested in a single Person.” This “vesting clause” and the way in which Wilson formulated the articles, situated the powers of the presidency firmly in the hands of the chief executive and precluded the sort of legislative interference Randolph had contemplated.<sup>220</sup> Wilson was not able in Committee to retrieve the foreign affairs powers that Randolph had assigned to the Senate; he no doubt decided to bide his time and to argue the matter in Convention. In any case, a presidency that had come to the Committee with little more than the veto power and the power to make appointments

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218. 1 CONVENTION RECORDS, *supra* note 2, at 415 (June 25).

219. 2 CONVENTION RECORDS, *supra* note 2, at 145–46; COMMITTEE DOCUMENTS, *supra* note 20, at 277–78. All the additions are in the hand of Rutledge. Originally the appointment power had read, “to appoint to offices not otherwise provided for”; Rutledge appended “by the constitution.”

220. See THACH, *supra* note 52, at 102–03.

(subject to Congressional control), left with a much broader range of powers that had effectually been insulated from Congressional interference. It is difficult not to see Wilson as the principal architect of these provisions.<sup>221</sup>

### 3. The Judiciary

As we saw earlier, Randolph's draft introduced, in a recognizable form, much of the specification of the jurisdiction of the federal courts.<sup>222</sup> In Rutledge's handwriting on that draft (which likely reflects Committee deliberations) are only two substantive additions, giving the federal courts jurisdiction over admiralty cases, and over disputes "between a State & a Citizen or Citizens of another State."<sup>223</sup> Wilson could have proposed either of these additions and certainly would have approved both; but there is no particular reason to attribute them to him rather than to Randolph or Rutledge. For Draft IX's treatment of the judiciary, Wilson essentially took the annotated Randolph Draft and polished the language; the boundary between original and appellate jurisdiction is specified with more precision and cases involving ambassadors are added to the list. But in substance, the draft adds little new.

Wilson's text of Document IX is essentially the draft of the Constitution presented by the Committee to the Convention on Monday, August 6. On August 5, some sixty copies were secretly printed by a local printer named John Dunlap for the use of the delegates.<sup>224</sup> This printed text contained one significant further addition: the first version of the Treason Clause. Because treason had been a special concern of Wilson's since his unsuccessful defense of accused loyalists and Quakers during the war, this clause, too, is likely to reflect his handiwork.<sup>225</sup>

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221. This is also the conclusion of Thach's meticulous study. Wilson's various interventions on the presidency during Act I and Act III of the Convention are discussed in detail in Ewald, *supra* note 42.

222. See *supra* note 112 and accompanying text (defining the jurisdiction for the Judiciary). The original language of the Convention Resolutions on this jurisdictional point was extremely vague and read as follows: "Resolved[.] That the Jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony." 2 CONVENTION RECORDS, *supra* note 2, at 132–33.

223. 2 CONVENTION RECORDS, *supra* note 2, at 147; COMMITTEE DOCUMENTS, *supra* note 20, at 279.

224. *Id.* at 175. Numerous copies of this Report have survived; Wilson's apparently exists, but is in private hands.

225. See James William Hurst, *Treason in the United States: II. The Constitution*, 58 HARV. L. REV. 395, 404–06 (1945) (describing Wilson's "particular interest" in the

## III. CONCLUSIONS

This has been a long analysis of the work of the Committee of Detail. Even so, it is far from complete. There remain two further documents in the Wilson archive; both relate to the plan submitted by Charles Pinckney at the start of the Convention. The story of these documents is complex, as is the analysis of their influence on the work of the Committee; so I shall defer a discussion of Pinckney to another occasion. There is also the question of the specific influence of the Committee Report on the Convention. The printed Report was distributed to the delegates and provided the framework for the debates in Act III: one wants to know how the Report was received and what happened to the controversial additions. (The Committee, incidentally, continued to meet during Act III; but we have no documentation of its internal activities.<sup>226</sup>) But these matters lie beyond the scope of this Article.

Let me now pull together the main threads. We can divide the contributions of the Committee into three rough categories:

(*α*) *Bookkeeping Contributions*. On many matters—indeed, on most matters—the Committee was simply writing up the explicit decisions of the Convention, or adding provisions from the Articles that everybody took for granted. (The Privileges and Immunities Clause and the Full Faith and Credit Clause fall into this category.) On these matters, it is safe to assume that the Committee was unanimous, and it would be idle to search for individual influences. (It is likely that Wilson incorporated into the Constitution many pieces of nomenclature taken from Charles Pinckney: but that is a point about terminology, not about substance.)

(*β*) *Controversial Insertions*. These are the additions that had no basis in the prior work of the Convention and that were ultimately rejected in August. They include especially the “deep South” provisions on slavery, on navigation acts, and on taxation of exports, as well as the resolutions on such matters as the power of the states to set the salaries of their representatives in Congress.

These provisions make their first appearance in the Randolph draft and are extremely important to the internal

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Treason Clause).

226. 2 CONVENTION RECORDS, *supra* note 2, at 321–22 (Aug. 18); 334–37 (Aug. 20); 383 (Aug. 23).

history of the Convention. As is well known, they caused immense controversy for most of the month of August: historians have discussed the issue of slavery at length and have invariably (and doubtless correctly) detected the hand of Rutledge in the Committee's recommendations. Within the Committee he must have had the support of Randolph and of at least one of the New Englanders. Here, Wilson, far from being the dominant member of the Committee, was certainly in the minority and possibly in a minority of one.

Whether the enumeration of congressional powers should also be included in class (β) is, as we saw, a debatable point. On the one hand, the enumeration first appears in the Randolph draft and is of a piece with his anti-federal tendencies. On the other, the enumeration is grounded in the Articles and most members of the Convention appear to have expected such an enumeration to be included. Wilson might well have favored a broader and less trammelled grant of legislative power than did the other Committee members; but the surviving evidence leaves the specifics of his position open to speculation. In any case, that enumeration survived the rest of the summer in a way the other proposals in (β) did not.

The initial Randolph draft, in addition to the controversial insertions, also reflects a powerful tendency to restrict the powers of the national government, to cabin the executive, and to enhance the powers of the states. Wilson is unlikely to have sympathized with any of this and especially with the treatment of the executive. If one carefully examines the sequence of drafts, from Randolph's Draft IV to the Committee's Draft IX, one sees a clear progression—not so much by a subtraction of the controversial early insertions as by the addition of provisions that bring the final Committee Report closer to the position of Wilson. How exactly this transformation was accomplished is impossible to say: presumably there was a tug-of-war, but the details cannot now be reconstructed. This brings me to the last category:

(γ) *Substantive Modifications*. In this category fall all those provisions not specifically mandated by the Convention (and thus not in (α)), but not so controversial as to fall within (β). Most of these modifications made their way into the final draft of the Constitution, with remarkably little further debate. It is important to emphasize that little in this category was entirely without precedent. There are exceptions, but almost every clause of the Committee Report has antecedents either in the Articles,

or in the state Constitutions, or in one of the three plans—Virginia, New Jersey, and Pinckney—that the Convention consigned to Committee. So here it was a matter, not of creating entirely from scratch, but of selecting, of choosing what to include from the mass of available materials, of filling in details, of formulating appropriate language, and of organizing the whole into a coherent text.

It is in category (γ) that Wilson's role is likely to have been the greatest. Randolph and Rutledge were clumsy draftsmen.<sup>227</sup> The fact that the Committee drafts are all in Wilson's handwriting; his skill as a drafter of legislation; his attention to fine shades of language; the existence among his papers of his own careful transcriptions of the Pinckney and New Jersey plans, all point to his deep involvement in the process. And there is a further matter. Wilson lived in Philadelphia. His house, with his desk and papers, was just across Chestnut Street from the State House. It is hard to imagine that the other members of the Committee sat at his elbow, patiently watching him write the successive drafts in longhand. It is far more likely that he did this work by himself, at home, presenting the results to the Committee for discussion and comment.

There is an instructive experiment that the reader can perform at this point. If one takes photocopies of the Convention resolutions, the state constitutions (especially of Massachusetts, New York, and Virginia), the texts of the New Jersey Plan and the Pinckney Plan, and the Articles of Confederation, and, with scissors, cuts them into individual clauses, spreads them out on the floor, and then rearranges them thematically, one quickly becomes aware of the vast range of possibilities: in these circumstances, the power to select, the power to organize, is also the power to create. And there is also the power to omit. We noticed, besides the positive contributions, also one conspicuous *negative* contribution of the Committee, most likely attributable to Randolph: the decision (connected, like so much else, to the issue of slavery) not to include a Bill of Rights.

Somewhat surprisingly, Randolph turns out to be more important than has generally been recognized. Wilson and Rutledge are typically assumed to have been the principal actors; that is likely correct, but it is in fact extremely difficult to assign *specific* clauses confidently to either. Randolph, on the other

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227. See *supra* note 115.

hand, seems to have produced the first draft of the Constitution by himself, working before the Committee first met. His draft contains several hobby-horses of his own and no hobby-horses of anybody else. As a result, certain novel provisions in that draft can plausibly be credited to him—notably the enumeration of powers and the specification of the jurisdiction of the federal courts. The former had precedent in the Articles; but the latter was new. Randolph was a considerable lawyer and later served as Attorney General: there is no reason to suppose him incapable of having drafted these provisions on his own. If so (and despite his failure to sign) he must be counted as one of the greatest contributors to the final document.

What of Madison? What of the claim that “With Wilson on [the Committee], it mattered little that Madison was off”?<sup>228</sup> If the suggestion is that Madison exercised control and that Wilson was simply carrying through his agenda, the claim is entirely lacking in evidence. In the first place, the provisions to which Wilson is most likely to have contributed have more to do with his own constitutional ideas than with Madison’s; and beyond that there is no sign that he ever regarded himself as acting in the service of anybody else. It is true that Madison subsequently endorsed much of the work of the Committee; and it is also true that, throughout the Convention, Madison and Wilson often found themselves in agreement. But beyond that, if there is any evidence of a direct and specifically Madisonian influence on the work of the Committee of Detail, I confess I have been unable to find it. Randolph’s concentration of powers in the Senate may owe something to him; but his most characteristic and distinctive ideas—the congressional veto, the Council of revision—are nowhere to be seen.

What about Wilson himself? Wilson was deeply involved in the drafting process, and the Committee report undoubtedly bears many traces of his influence. It is incorrect, however, to exaggerate this point and to characterize the Committee as “a committee of Wilson and four others.” Randolph and Rutledge in particular were powerful countervailing influences—certainly in category ( $\beta$ ), but no doubt in ( $\gamma$ ) as well. What provisions show the marks of his handiwork? As we saw, it is impossible to link specific clauses to him with the same confidence that is possible for Randolph. But the likeliest candidates are: the opening words, “We the People of the States”; the strong version

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228. BRANT, *supra* note 31.

of the Necessary and Proper Clause; the Treason Clause; the Supremacy Clause (with regard to state constitutions); and much of the detailed structure of the powers of the presidency. These are issues that had particular salience to Wilson, and to which he devoted considerable thought. They are not visible in the Randolph draft. More importantly, they would have been out of character for either Rutledge or Randolph, and they are too legally subtle for it to be likely that they emanated from Ellsworth or Gorham. There may be other provisions for which Wilson bears the primary responsibility, but those seem the most likely.

But these ascriptions of responsibility are likelihoods rather than certainties. They cannot be established beyond all doubt; and in any case, each of the contributions of the Committee would have needed the assent of at least three committee members.

That said, the following can be asserted with confidence. The Committee of Detail was not just an interlude in the history of the Convention and not just a matter of “tidying up.” That is true at most for the items in category ( $\alpha$ ); but manifestly false for ( $\beta$ ) and ( $\gamma$ ). For our purposes, the category to focus on is ( $\gamma$ ). It was the Committee that worked out, in a recognizable form, the main elements of American federalism and wrote them into the Constitution: the enumeration of powers, the Necessary and Proper Clause, the Supremacy Clause, the prohibitions on the states, the specification of the jurisdiction of the federal courts, and certain aspects of the presidency. Those things had scarcely been discussed in the prior work of the Convention; they were added by the Committee, and they were to survive into the final document, for the most part with only slight modifications to the language. These elements are so fundamental to the Constitution that they entitle the Committee to be counted as “Act II” of a three-act Convention, fully comparable in importance to what went before and what came after. Indeed, Oliver Ellsworth is reported to have made this very point to his son in 1802:

He, Judge E., told me one day as I was reading a Newspaper to him containing Eulogiums upon the late General Washington, which among other things ascribed to him the founding of the American Government to which Judge Ellsworth objected, saying President Washington’s influence while in the Convention was not very great, at least not much as to the forming of the present Constitution of the United States in

1787, which Judge Ellsworth said was drawn by himself and five others, viz.—General Alexander Hamilton, Gorham of Mass, deceased, James Wilson of Pennsylvania, Rutledge of South Carolina and Madison of Virginia.<sup>229</sup>

Ellsworth's memory may have been faulty, or his son may have misheard or misremembered his words; but his list is just the Committee of Five, with Hamilton substituted for Randolph, and the entirely justified inclusion of Madison among the principal framers.

Beyond those observations, there are three broad morals to this story. The first is that the mere presence or absence of archival documents matters greatly to the way we conceive the origins of the Constitution: and the survival of the documents is in large measure a matter of happenstance. Secondly, the documentation concerning the Committee of Detail is more dry and technical than the dramatic story contained in Madison's *Notes*; and that very fact (as well as the way in which the documents are reprinted by Farrand) has tended to deflect the historiography of the Convention away from the actual legal accomplishments—away, that is, from constitutional law—and towards the human-interest story of the events of the Convention itself. I take it to be clear that this is a misplaced emphasis.

The third moral is perhaps the most important. In working with the Committee of Detail manuscripts, it is of great importance not to let interpretation run ahead of the evidence. In particular, it is important not to ascribe to the Committee members an understanding of their task that nobody would have had in 1787. Many matters of central constitutional importance were not worked out until years later; and although the members of the Convention were unquestionably farsighted, they were not clairvoyants. The implications even of some of their most fundamental decisions could not at the time have been foreseen.

In analyzing the work of the Committee of Detail I have tried to establish what can be known about its contributions to the Constitution: but it is equally important to take note of what *cannot* be known. It is natural to wonder, for instance, what the members of the Committee, when they drafted the Necessary and Proper Clause, thought its precise relationship was to the enumeration of powers; and it is disappointing to find that the

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229. 3 CONVENTION RECORDS, *supra* note 2, at 396–97.



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evidence does not supply an unambiguous answer. But there is no way to tell. At bottom, the only evidence we have for reconstructing the original intent of the Framers is a few old scraps of paper. If one undertakes some painstaking archival and textual work, there are indeed many important things to say about their intentions. But the documentary sources are problematic; they are incomplete; they undoubtedly contain distortions and hidden agendas; and there is absolutely no reason to suppose that they are able to answer any anachronistic question that lawyers are capable of asking. At some point, the evidence simply runs out.